University of Alberta

In loco Regis - The contemporary role of the Governor General and Lieutenant Governor in Canada.

By Alfred Thomas Neitsch ©

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Canada

Abstract

A contemporary misconception exists in Canada that the Governor General and Lieutenant Governors are politically impotent. However, there is legal basis for the broad and considerable political powers of the Lieutenant Governor and Governor General in the *Constitution Act*, 1867, *The Letters Patent*, 1947, the *Constitution Act*, 1982, and Commonwealth law and tradition, including the Royal Prerogatives. These legal documents conflict with established misconceptions in the Canadian body politic, including conventions. Nonetheless, modern precedents in Canada and the Commonwealth have demonstrated that these powers are still in full legal effect, despite convention, and they may be used at the discretion of Canada's vice-regals. The powers of the Governor General and the Lieutenant Governor have not been constitutionally repealed. Instead, in some respects they have been further entrenched and enhanced since Confederation. In some limited instances, intervention might be required and therefore holders of the vice-regal offices should be independent.

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Dr. Ken Munro, who as a committee member, went well above the call of duty. I am very thankful for him proofreading and reviewing my thesis. Over the past couple of years, he was a highly accessible expert on the Crown. Dr. Munro would gladly chat on the role of the Governor General and Lieutenant Governor. He helped me understand the vice-regal role. For these reasons, it was a requirement that he be on my committee.

The Rt. Hon Edward Schreyer, who from the first time I contacted him, was supportive and interested in my thesis. I am truly appreciative of the interview that he granted me in which I learned so much on the proper role of the Governor General and the Lieutenant. If all vice-regals aspired to be like him, our political system would be stronger and more effective.

My Mother and Father who encouraged me to write.

My friends who ensured I was not lonely during the thesis writing.

Additionally, I would like to thank others including Sherry Bell, Eileen Cardy and Margaret Shane for their great efforts and their assistance.

To the men and women of the Canadian Forces who have and will forever fight for Peace, Order and Good Government,

To the Governors General and Lieutenant Governors who got the vice-regal role right,

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Chapter I. Introduction & Brief Historical Role.

J.R Mallory has argued that the success of a political system is based on the fact that,

> …its members share a vocabulary of political terms whose meaning includes shared values. The system will continue to function well if its basic values and institutions reinforce one another. However, many of the terms are code words which may mean different things to different people.[1]

The study of the Governors General and the Lieutenant Governors in Canada mirrors Mallory's interpretation of code words. The role of the Lieutenant Governor and the Governor General is convoluted and complex, as there is no universally accepted interpretation of what those roles are. To paraphrase Mallory, the role of the Governor General and the Lieutenant Governor means different things to different people. This field includes the general citizenry, Constitutional experts, politicians and even the vice-regals themselves. Even veteran politicians in Canada do not agree on the role, in fact diametrically opposed opinions are readily evidenced. Consider an exchange in the House of Commons between Pierre Trudeau and John Diefenbaker on the role of the Governor General on January 23, 1978. The Right Hon. J. G. Diefenbaker, the Member of Parliament for Prince Albert, queried the Prime Minister,

> …the Queen has been divested of certain of her powers, the detail of which I shall not refer to now, which amounted to an evisceration of her rights. I want to ask simply one question. Was that done by action of Cabinet? If so, upon what date was the decision made by the Queen's powers should be so reduced that the Governor General virtually becomes the president of this country? Was it done by order in council, or how was it done?[2]

Trudeau responded, "Mr. Speaker, the Right Hon. Member asks the date and asks how it was done. It was done in 1947 by publication of *Letters Patent* giving the Governor General of Canada all the powers exercised by the Queen."[3] Diefenbaker was rather incredulous at Trudeau's answer claiming,

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[1] Mallory, J.R. "The Continuing Evolution of Canadian Constitutionalism" from Cairns, Alan & Williams, Cynthia. Constitutionalism, Citizenship and Society in Canada. Royal Commission on the Economic Union and Development Prospects for Canada. Vol. 33. University of Toronto Press: Toronto, 1985. p.51

[2] Canada, House of Commons, *Debates.*, 1977-78 (January 23, 1978) p. 2088

[3] Ibid.

> …the Prime Minister at the time, Mr. St Laurent, respected the Crown-something the Prime Minister has not done. Throughout he has done everything to destroy the monarchy in our country. It was not done in 1947…was it done by himself [Trudeau] in his general efforts to emasculate the monarchy?[4]

Trudeau was obliviously right in this exchange and Diefenbaker seemed to be missing some basic knowledge on the Governor General. Another instance involving Diefenbaker occurred in 1961, after the Lieutenant Governor of Saskatchewan reserved legislation. In response to the reservation, Diefenbaker made an inaccurate statement in the House of Commons, later corrected by J.R Mallory, "Thus Prime Minister Diefenbaker, who asserted in the House on April 12, that 'reservation[s] by lieutenant governor have been generally accepted as dependent upon a request from the governor in council,' is wrong too."[5]

If a former Prime Minister and veteran Canadian politician was confused about the powers and role of the Governor General and the Lieutenant Governors and was in fact perpetuating these myths in the House of Commons what does this say about the views and opinions of Canadians unfamiliar with the political process in Canada? It speaks volumes. To paraphrase Paul Romney's book title many Canadians have construed the role of the Governor General and the Lieutenant Governor wrongly, as they have forgotten their past and quite possibly imperilled their future. A proper interpretation of the roles of the Governor General and the Lieutenant Governor should be offered. It should be clear that there is not a clear and present threat of a Lieutenant Governor or Governor General acting inappropriately, or failing to act when necessary because of unfamiliarity with the role. Nor should this be viewed as Canada's most pressing concern. However, its importance should not be discounted either. Adam M. Dodek has argued that, "whole areas of Constitutional law have been forgotten by the current generation of legal academics, ceded almost completely to political scientists. Issues raising questions about the exercise of executive power once stimulated the interest of legal scholars…"[6] Dodek has perhaps overstated the willingness of political scientists to examine the exercise of executive power, especially with respect to the Offices of the Lieutenant Governor and the Governors General. His chief complaint among legal scholars that they "have become mesmerized by the seductive dance of the Charter," holds true for Canadian political science as well.[7] Dodek notes that some Constitutional law "has let lay fallow for sometime," including the vice-regal offices.[8] Dismissed as antiquated institutions, these offices are often that have little relevance save for ceremonial activities. This is despite the fact that the, "legal existence of the government is derived from the Crown."[9] Overlooked are the considerable powers Lieutenant Governors and Governor General. An argument persists that these powers may only be used with ministerial advice. Are these assumptions true? Are vice-regals as impotent as everyone thinks? On the other hand, is there some evidence that they play a meaningful role in contemporary Canada? Do they use or threaten to use their reserve powers? Are they a check and balance on elected executives?

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[4] Ibid.

[5] Saywell, John T. "Reservation Revisited: Alberta, 1937. " The Canadian Journal of Economics and Political Science, Vol. 27, No.3 August 1961 p. 368

Given this complexity surrounding the role of vice-regals, a more fundamental research question must be asked. Are vice-regals politically relevant in contemporary Canada? This thesis will answer this research question in the affirmative. I will claim that, indeed, vice-regals do play an important role in contemporary politics. However, despite their extraordinary powers, several misconceptions on the role of the vice-regals persist among the public, the media and even scholars. Some of the criticisms of vice-regal action, I will claim, are overblown and even arbitrary.

In order to demonstrate these assertions it will be necessary to examine the basis for vice-regal powers- Firstly, some Constitutional documents and legal statutes such as the *Constitution Act, 1867 and 1982*, the *Letters Patent, 1931 and 1947* will confirm a broad legal basis for intervention for vice-regals and action.

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[6] Dodek, Adam. "Rediscovering the Constitutional Law: Succession Upon the Death of the Prime Minister." University of New Brunswick Law Journal 2000. p. 33

[7] Ibid.

[8] Ibid.

[9] Ibid.

Secondly, an assessment of the Westminster system will reveal the need for a proper separation of powers, which includes the Crown serving as a check on the legislature and the first minister.

Additionally, the Royal Prerogatives are essential to understanding the role of the Governor General and Lieutenant Governor. The Royal Prerogatives will be revealed as not largely subject to judicial review and being unable to fall into disuse. These prerogatives provide vice-regals with significant reserve and emergency powers that allow them to refuse and force dissolution, appoint and dismiss first ministers. The Royal Prerogatives also allow for vice-regals can reserve, disallow and refuse Royal Assent.

Fourthly, an examination and review of conventions, or the unwritten Constitutional practice, will demonstrate that conventions do not limit the ability for vice-regals to intervene in contemporary Canada. In fact, the examination will demonstrate that vice-regals are adjudicators of convention and are able to breach convention when needed. For this reason, vice-regals are the last guardians of the rule of law.

Finally, to further support the hypothesis it will be necessary to examine precedents of vice-regal action and inaction in Canada and the Commonwealth. An examination of these precedents will reveal support to the theoretical arguments outlined. This examination will review the tenures of several Canadian Governors General including Lord Byng, Roland Michener, Edward Schreyer, Jeanne Sauvé, Adrienne Clarkson and Michaëlle Jean. The actions of several Albertan Lieutenant Governors will be studied including William Walsh, John Bowen, Ralph Steinhauer, Gordon Towers and Bud Olsen. Lieutenant Governors from the rest of Canada will include Frank Bastedo, John B. Aird, David Lam and Lise Thibault. Several Commonwealth precedents will also be studied and this will include the Whitlam dismissal in 1975, the use of reservation in 2006, and a brief review of some interventions by State Governors in Australia. These case studies will demonstrate the relevance of vice-regals in contemporary politics.

All this evidence and discussion will inevitably confirm fully my hypothesis, namely:

A contemporary misconception exists in Canada that the Governor General and Lieutenant Governors are politically impotent. However, there is legal basis for the broad and considerable political powers of the Lieutenant Governor and Governor General in the *Constitution Act*, 1867, *The Letters Patent*, 1947, the *Constitution Act*, 1982, and Commonwealth law and tradition, including the Royal Prerogatives. These legal documents conflict with established misconceptions in the Canadian body politic, including conventions. Nonetheless, modern precedents in Canada and the Commonwealth have demonstrated that these powers are still in full legal effect, despite convention, and they may be used at the discretion of Canada's vice-regals. The powers of the Governor General and the Lieutenant Governor have not been constitutionally repealed and instead in some respects they have been further entrenched and enhanced since Confederation. In some limited instances, intervention might be required and therefore holders of the vice-regal offices should be independent.

At this point, it would be helpful to note that the purpose of this thesis is not to provide an exhaustive or precise overview of the role of the Lieutenant Governor or the Governor General, but merely to demonstrate its modern relevance and some possible political machinations that may be necessary for vice-regals to exercise their powers in Canada. In doing so, one must be mindful of the warning provided by Jules Léger to the Montreal Chamber of Commerce, March 12, 1974: "Only a very clever man- a very reckless one-would try to define precisely the role of the Governor General today. For one thing his actions are based largely on his responsibilities in the area of representation, one that is as vast as Canada itself."[10]

A brief history of vice-regals is needed to provide some context.

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[10] Léger, Jules. Léger, Jules: Governor-General of Canada 1974-1979 A Selection of his Writing on Canada. La Presse: Ottawa, 1982. p. 80

A. Governor General

Canada has had a Governor for the entirety of its existence. Indeed, it had a governor prior to its existence. The founding of New France brought a governor and this tradition continued after the fall of New France. However, rather than rehashing the history and role of the Governor General since New France it may be more appropriate to begin at Confederation, or shortly before it.

In 1867, Prime Minister John A. Macdonald committed Canada in perpetuity to a monarchical system. John A. Macdonald would note personally to Queen Victoria, "We have desired in this measure to declare in the most solemn and emphatic manner our resolve to be under the sovereignty of Your Majesty and your family forever."[11] However, at that time the Canadian Sovereign had already relinquished many of her powers to Canada's Governor General, and since that time all of them through the issuance of various *Letters Patent*. However, this commitment to the monarchical system today is not as strong as it was with Confederation. The political executives have attempted to usurp the powers and authority of the Crown, by spreading the perception that vice-regals fill a purely ceremonial role. This was not the original intention of the Imperial Government, however.

Before Confederation, the Imperial Government in London was apprehensive about conferring too much power in the hands of the Prime Minister and Premiers. To this end, the Governor General and the Lieutenant Governors were given nearly exhaustive executive power. As W.A Matheson has noticed, "...in 1867 the British government did expect the Governor General to have a very active part in governing Canada, and that it was assumed that cabinet government was to operate so the Crown, through the Governor General, would take a far more active role than the monarch did in Great Britain."[12] This sentiment was evidenced by the instructions provided to Canada's first Governor General at Confederation. Lord Monck would note to his successor, the Earl of Dufferin, "there was nothing in the BNA Act that required the Governor General to accept the advice offered by the Cabinet, except in those sections that referred specifically to the Governor-in-Council."[13] The Earl of Dufferin wrote early in his tenure as Governor General, "The Governor General's opportunities to supervise extend to the minute matters of administration- about every act of the Government requiring an order-in-council, which only becomes valid on his signature being attached to it. The means therefore of checking whatever is going wrong is always ready to his hand."[14]After Confederation, which undoubtedly had the required features of responsible government, there was nevertheless a clear history of interventionist Governors General and Lieutenant Governors as well. The earlier mentioned Earl of Dufferin would even attend cabinet meetings where he "sat like a Stuart monarch and sometimes summarily influenced the debate."[15]

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[11] "How about Canadian Monarch?" Times - Colonist. Victoria, B.C.: Mar 10, 1994. p. 1

[12] Matheson, W.A. The Prime Minister and the Cabinet. Methuen: Toronto, 1976. p. .8

One of the first real tests of the Office of the Governor General came in April 1873 with the Pacific Railway scandal. There were allegations that John A. Macdonald and his ministry had taken bribes in awarding a transcontinental railway contract. If these allegations were true, the Earl of Dufferin thought that he might have to dismiss the Macdonald ministry. Refusing to act rashly the Governor General was eager to hear the details of what had occurred and if Macdonald was in fact guilty of the charges. The Liberal opposition accused the Governor General of letting his political views get in the way of the proper administration of his office. Dufferin contested this view claiming that he "required them [the Liberals] to run him [Macdonald] fairly to the ground, in a Constitutional manner."[16] Barbara Messamore recounts that the Earl of Dufferin thought the best source of information would come from the House of Commons debates themselves. However, but the Governor General was barred by Constitutional convention from entering the House. The Earl of Dufferin obtained information second hand from visitors to the Commons press gallery, including his wife. In the end, the Earl of Dufferin did let his personal views cloud his judgement. As he would note to the Colonial Secretary, he delayed in acting against Macdonald, as he might "have been tempted to have forced the situation a bit more' if there had been a better alternative than Liberal Leader Alexander Mackenzie. 'Though I like him personally he is a poor creature."[17]

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[13] Ibid.

[14] De Kiewet, C. and Underhill, Frank, Dufferin-Cameron Correspondence, 1874-1878. (Toronto; Champlain Society, 1955) p. 240

[15]McNutt, W.S. Days of Lorne. Brunswick Press: Fredericton, 1955. p. 127-128

[16] Messamore, Barbara J. "'The Line which he must not pass': Defining the Office of Governor-General, 1878. " The Canadian Historical Review Vol. 86, Number 3, September 2005. p.465

Major changes to the Office of the Governor General came in 1878 with the issuance of new *Letters Patent*. The 1878 *Letters Patent* were the first permanent ones issued. Prior to this, new instructions were issued with the appointment of each Governor General.[18] David M. L. Farr reflected on the 1878 changes to the office of the Governor General,

> These changes, besides having the effect if recognizing existing practices on the part of the holders of the office, also resulted in the sphere of independent action open to the Governor General being restricted still further. The section in the Instructions requiring the Governor to reserve various types of bills was abandoned, as were other clauses allowing him to preside at Council meetings and to exercise a personal discretionary power…The power to disallow provincial legislation, to exercise the prerogative of mercy, to grant or refuse dissolution, to dismiss a Lieutenant Governor, to reject appointments suggested by the Prime Minister-the responsibility for all these functions came to lie with the cabinet and not with the person of Governor General.[19]

Alpheus Todd contended that the new permanent *Letters Patent*, "clearly indicate, in their substantial omissions, as well as in their positive directions, the larger measure of self-government thenceforth conceded to the new dominion…was not merely relatively greater than that now enjoyed by other colonies in the empire, but absolutely more than had been previously intrusted [sic] to Canada itself, during the administration of any former Governor General."[20]

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[17] Ibid.

[18] Ibid.

[19] Farr, David M. L. The Colonial Office and Canada, 1867-1887. University of Toronto Press: Toronto, 1955. p. 54

[20] Messamore, Barbara J. "'The Line which he must not pass': Defining the Office of Governor-General, 1878. " The Canadian Historical Review Vol. 86, Number 3, September 2005. p.465

The 1926 Byng-King debate changed the perceptions of the Governor General in Canada. This dispute would start with the 1925 election. It was clear with the 1925 elections that Mackenzie King had been defeated at the polls and yet he continued to serve as Prime Minister. After the election on October 29, 1925, some 116 Conservatives along with 101 Liberals, 24 Progressives, 2 Labour and 2 Independents were returned to the House of Commons.[21] The previous election on December 6, 1921 had resulted in the following seat count: 117 Liberals, 65 Progressives, 30 Conservatives and 2 Labour. Clearly, the electorate had demonstrated a will for the Conservatives rather the Liberals to form the government. This was especially true for the voters in Mackenzie King's own riding who chose not to return him to Parliament. Mackenzie King would later win a by-election. The Conservatives had a clear plurality. However, the Progressives pledged to support the Liberals and so King continued to govern.

The customs scandal broke soon after the 1925 election. The scandal concerned a smuggling operation between Canada and the United States that defrauded the Canadian government millions of dollars in tariff revenues. This scandal implicated Jacques Bureau, the former Liberal Minister of customs and Excise. Mackenzie King chose largely to ignore the scandal, meeting the ire of the House of Commons. On June 18, 1925, a tri-partisan committee, comprised of three Liberals, three Conservatives and a Progressive, was appointed to investigate the scandal. The committee reported that, "it had found very disturbing evidence of corrupt practices on the part of certain officials and of insufficient attention to his duties by the former minister of customs, Jacques Bureau."[22] On June 22, H.H Stevens, a Conservative MP, proposed an amendment in the House, which would censure the Prime Minister and his government as being "wholly indefensible" in the scandal. [23] The committee also cited the behaviour of the Minister of customs as "utterly unjustifiable."[24] The next day, J.S Woodsworth of the Labour Party proposed an amendment to the Stevens amendment that would remove the censure of the

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[21] Graham, Roger. The King-Byng Affair, 1926: A Question of Responsible Government. The Copp Clark Publishing Company: Toronto, 1967. p.3
[22] Ibid.
[23] Ibid.
[24] Forsey, Eugene. The Royal Power of Dissolution in the British Commonwealth. Oxford University Press: Toronto, 1968. p. 132

Prime Minister and the Liberal government and would instead propose a more general condemnation of all political parties. The Woodsworth amendment included the transfer of the investigation of the customs scandal from Parliament to a judicial inquiry. On June 25th, during the debate over the scandal, there was an attempt to adjourn this debate. This attempt proved unsuccessful. However, on Saturday June 26 at 5:15 am another adjournment motion was this time successfully attempted. Debate on the customs scandal halted before a vote on censure of the government could be undertaken.

During the customs scandal debate, Mackenzie King requested that Governor General Lord Byng dissolve Parliament and call a general election. The Governor General refused this request. King continued to tender this advice to Lord Byng during the weekend of June 27-28. Lord Byng continued to refuse this advice as he did an order-in-council that Mackenzie King presented him on Monday June 29 to dissolve Parliament. As a result, Mackenzie King resigned as Prime Minister. Mackenzie King, hoping to force an election, explained to the House of Commons that Canada was now without a Prime Minister and a government so an election must follow. Lord Byng resolved that if Mackenzie King could command the confidence of the House of Commons with only 101 seats, surely the Conservative leader Arthur Meighen could command the House of Commons with 117 seats. Therefore, he appointed Arthur Meighen as Prime Minister. The Progressive Party had largely removed its support of the Liberals and instead pledged to support Meighen. However, there was a slight problem for Arthur Meighen as "it was provided in the law at the time (and until 1931) that a member of the House of Commons who joined the cabinet and received a salary as minister of a department automatically vacated his seat and must be returned to the House in a by-election."[25] On June 30, the Liberal Opposition challenged the confidence and legality of the Meighen government. The Meighen government was initially able to fend off this attack by King with a majority of seven votes.[26] Then former Liberal Finance

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[25] Graham, Roger. The King-Byng Affair, 1926: A Question of Responsible Government. The Copp Clark Publishing Company: Toronto, 1967. p.4

[26] Forsey, Eugene. The Royal Power of Dissolution in the British Commonwealth. Oxford University Press: Toronto, 1968. p. 138

Minister challenged the ability for Meighen's members "acting as ministers" to sit in the Commons,

> That the action in the House of the Honourable Members who acted as Ministers of the Crown since the 29th of June, 1926, namely the Honourable Members for West York, Fort William, Vancouver Centre, Argenteuil, Wellington South, and the Honourable senior Member for Halifax, are a violation and an infringement of the privileges of this House for the following reasons:-That the said Honourable gentlemen have no right to sit in this House and should have vacated their seats therein if they legally hold office as administrators of the various departments assigned to them by orders-in-council; that if they do not hold such office legally, they have no right to control the business of Government in this House and ask for the Departments of which they state they are acting as ministers.[27]

The Meighen government was in a difficult position. If his ministry had been appointed properly they could not very well sit in the House until they had first be re-confirmed by the electorate in a by-election. If they had not been properly appointed the Meighen government could not very well claim to be the government. As a result, the House voted again on the motion. Through confusion, a paired member from Manitoba voted on the motion when he should not have. This action ultimately brought down the Meighen government.[28]

Before the House could meet again, Prime Minister Arthur Meighen advised the Governor General to dissolve Parliament and call general elections. Lord Byng followed this advice. The resulting election brought the post of the Governor General into prominence and debate. Mackenzie King argued during the campaign that "He [Lord Byng] had not that right, I submit,"[29] King also claimed that this represented a breach of Constitutional practices, "To summon Parliament and to allow the House of Commons to disclose its attitude upon division is the procedure warranted by the Constitutional precedent and by the present circumstances. To take any other course would be to fail to recognize supreme right of the people to govern themselves in the manner which the constitution has provided, namely, expressing their will through their duly elected representatives in Parliament."[30]

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[27] Canada, House of Commons, *Debates.*, 1926 p. 492-6

[28] Graham, Roger. Arthur Meighen: Volume Two: And Fortune Fled vol. II. Clarke, Irwin & Co: Toronto, 1963. p. 443-445.

[29] Forsey, Eugene. The Royal Power of Dissolution in the British Commonwealth. Oxford University Press: Toronto, 1968. p. 136

B. Lieutenant Governor

With the *Constitution Act, 1867*, the Lieutenant Governor was clearly subordinate to that of the Governor General. The subordinate role included several ceremonial aspects. Lieutenant Governors were not entitled to salutes or other privileges conferred on the Governor General. Lieutenant Governors were also styled as 'His Honour', rather than the higher form of address of 'His Excellency,' the title provided to the Governor General.[31] Lieutenant Governors could not appoint Queen's Counsel nor issue the royal prerogative of mercy or pardon. The Duke of Buckingham conveyed the rationale for this inferiority to Governor General Lord Monck in 1868: "The Lieutenant Governors of the Provinces, holding their commission from the Governor General will not be entitled to salutes."[32] Since the Lieutenant Governors were not appointed by the Queen, but rather by the Governor General, the Imperial government could not trust them.

John A. Macdonald would argue the Lieutenant Governor would be subordinate to the Governor General: "the executives of the local governments [the provinces] hereafter be subordinate to the Representative of the Queen, and be responsible and report to him."[33]It is clear that the Lieutenant Governors would also be subordinate to the Federal Cabinet. The Lieutenant Governor was envisioned to function in a dualist role, as a representative of the monarch, but more clearly as a Dominion Officer doing the bidding of the Federal Cabinet. Peter J.T O'Hearn recounts, "The office of Lieutenant Governor also was conceived as a dual function: the governor was at the time a federal superintendent and legal head of the provincial government."[34] This was by no means a ceremonial role as,

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[30] Ibid. p. 173

[31] Beck, J.M. The Shaping of Canadian Federalism: Central Authority or Provincial Right? Copp Clark Publishing: Toronto, 1971p.62

[32] Duke of Buckingham and Chandos to Viscount Monck, October 19, 1868, *Ontario Session Papers*, No. 17, Vol. I, Part II 1868-69, p. 4

[33] Parliamentary Debates on the Subject of the British North American Provinces, 1865. Hunter & Rose Parliamentary Printers: Quebec, 1865. p. 42

> In the early days, some governors, notably in the new provinces, actually conducted the administration. There were exciting clashing in Quebec and British Columbia between strong-minded governors and their ministries, leading to the dismissal of five Cabinets. In the first half-century of Confederation, governors refused assent to twenty-six bills and reserved sixty-four for action in Ottawa.[35]

Many of these interventions were at the behest of the Federal Cabinet. One example came in 1886 when John A. Macdonald wrote to warn the Lieutenant Governor of Nova Scotia, of the desire of the province to leave Confederation. Macdonald noted, "Should your ministers found their advice for an early dissolution on the ground that they desire an immediate expression of the will of the people as to their remaining in the Confederation-you will, I have no doubt, feel it your duty as a Dominion Officer, to decline to allow that subject to enter into consideration at all."[36]

Clearly, the federal role was more emphasised as the provinces viewed the Office of the Lieutenant Governor as a blatantly federal institution that infringed on the rights of the provinces,

> The fulcrum for Dominion interference was the Lieutenant Governor. Appointed and removed by the Dominion Government; considered by the Imperial Government as well as by the Dominion Government as merely a Dominion Officer mainly useful for bringing Provincial policies into harmony with those of the central Government; the Lieutenant Governor must have appeared to Mowat as likely to prove a "Trojan Horse' within the Provincial Citadel.[37]

The frustrations felt by the provinces lead them to challenge assertions that Lieutenant Governors possessed limited powers. As Ken Munro recounts, "From 1867 onwards, Oliver Mowat, the Premier of Ontario, attempted to change the notion of subordination of the Lieutenant Governor (and to thus also the provinces)," and this came with *Liquidators of Maritime Bank v. Receiver General.* [38]

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[34] O'Hearn, Peter J. T_Q.C Peace, Order and Good Government: A New Constitution for Canada. The Macmillan Company of Canada: Toronto, 1964. p. 100
[35] Ibid.
[36] Pope, Sir John (ed.). Correspondence: Selection from the Correspondence of John Alexander Macdonald. Toronto: Oxford University Press, 1921. p. 379
[37] Beck, J.M. The Shaping of Canadian Federalism: Central Authority or Provincial Right? Copp Clark Publishing: Toronto, 1971. p. 70

In *Liquidators of Maritime Bank v. Receiver General*, [1892] A.C 437 the Judicial Committee of the Privy Council (JCPC) effectively reversed some twenty-five years of Constitutional law and practice. Until that point, the Lieutenant Governor was regarded primarily as a representative of the federal government. However, after the Maritime Bank went bankrupt, the New Brunswick government, eager to regain its funds, argued, "…the Lieutenant Governor was the representative of the monarch and possessed all of the prerogative powers of the Crown. This meant that the government of New Brunswick could use Crown prerogative as a basis for claiming priority over other creditors seeking to recover funds from the liquidators of the Maritime bank."[39] The JCPC agreed with this argument and as Peter Hogg recounts, the ruling "established that the Lieutenant Governor of each province, although appointed by the federal government, was not the representative of the federal government, but of the Queen."[40]Ronald Cheffins confirms this sentiment, "The Maritime Bank case thus meant that the Lieutenant Governor possessed all of the prerogative powers, such as: the appointment of a premier and cabinet ministers, and the summoning proroguing, and dissolving of the provincial legislature."[41] The historical significance of this case lies in the fact that legally speaking the Lieutenant Governor would no longer be viewed as a Dominion Officer or in anyway subordinate to the central government.

In *Re The Initiative and Referendum Act in 1919,* the Judicial Committee of the Privy Council decided the validity of legislation, " which, as it was held, would compel the Lieutenant Governor to submit a proposed law to a body of voters distinct from the Legislature, and would render him powerless to prevent it becoming an actual law if approved by those voters."[42]. Manitoba had proposed having binding referendums that would bypass the legislature and the Lieutenant Governor. Eugene Forsey has described that the courts found in this case that the legislature did not have the necessary power to curtail the power of the Crown, as described,

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[38] Munro, Ken. "Alberta's Crowning Glory: The Office of Lieutenant-Governor. " F rom Richard Connors & John M. Law (ed.) Forging Alberta's Constitutional Framework. The University of Alberta Press: Edmonton, 2005. p. 300

[39] Ibid.

[40]Hogg, Peter. Constitutional Law of Canada 3rd Edition. Toronto: Carswell, 1992. p. 18

[41] Cheffins, Ronald I. "The Royal Prerogative and the Office of Lieutenant Governor. " Canadian Parliamentary Review vol. 23, no.1 2000 http://www.parl.gc.ca/Infoparl/english/issue.htm?param=74&art=163http://www.parl.gc.ca/Infoparl/english/issue.htm?param=74&art=163http://www.parl.gc.ca/Infoparl/english/issue.htm?param=74&art=163

> The Manitoba legislature had passed an Initiative and Referendum Act. The Judicial Committee held it *ultra vires* because it would have taken away from the Lieutenant Governor the power to withhold or reserve the Royal Assent in respect of bills passed by process of initiative and/or referendum. Lord Haldane, for the Judicial Committee, speaks of the "the impropriety of…permitting the abrogation of any power which the Crown possess through a person who directly represents it.[43]

The significance of this case in modern times can be seen with the proliferation of fixed election dates, which may be viewed as unconstitutional if they do not adequately recognize that dissolution is a prerogative power of vice-regals and all dissolutions require vice-regal assent. The power of dissolution should be viewed as an implicit part of the vice-regal offices, which are constitutionally entrenched.

The Supreme Court of Canada would make an important ruling regarding vice-regal powers in 1938. On this occasion, the Alberta government under William Aberhart had challenged the authority of the Lieutenant Governor and the Governor General to intervene with respect to disallowance and reservation of provincial legislation. On March 4, 1938, the Supreme Court of Canada ruled in *Reference RE Power of Disallowance and Power of Reservation* that power of disallowance, was still a subsisting power and not subject to any restrictions or limitations, save that disallowance must be exercised within a year of the Governor General's receipt of the legislation in question.[44] The Supreme Court also argued that the power of reservation of provincial legislation for the review of the Governor General was not subject to any limitations or restrictions either, except such action would have to in keeping with instructions from the Governor General.[45] The Supreme Court noted, "There is nothing, however, in all this in the least degree incompatible with a Lieutenant Governor reserving a bill for the signification of the pleasure of the Governor General who is the representative of the Crown or in the disallowance of an Act of the Legislature by the Governor General acting on the advice of his Council who, as representing the Sovereign, constitutes the executive government for Canada."[46] This decision by the Supreme Court has not been contradicted by any subsequent rulings. In fact, this court case has been cited in contemporary times.

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[42] *Reference RE Power of Disallowance and Power of Reservation*. [1938] 2 D.L.R. p. 11

[43] Forsey, Eugene. "Extension of the Life of Legislatures. " The Canadian Journal of Economics and Political Science, Vol. 26, No.4 (November 1960) p. 609

[44] *Reference RE Power of Disallowance and Power of Reservation*. [1938] 2 D.L.R. p. 11

[45] Ibid.

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[46] Ibid. p.3

Chapter II. The Popular View

A. Popular Misconceptions

In contemporary times, the Lieutenant Governors and Governors General are viewed as little more than ceremonial figures. As Lowell Murray argues, "The Crown has become irrelevant to most Canadian's understanding of our system of Government."[47]The popular Canadian comedian Rick Mercer encapsulates a view of Canada's vice-regals supported by many Canadians,

> Everyone knows what Lieutenant Governors are: they are an elite group of politically connected senior citizens who represent the Queen in each of the provinces. These brave men and women are required to attend cocktail receptions on a daily basis for their country.[48]

The sentiment expressed by Rick Mercer was partially confirmed by a poll commissioned by CTV and the Globe and Mail in September 2005. One of the poll's questions asked: "Last year, the total budget for the Governor General of Canada was $19 million. When you think of the value that the Governor General brings to Canada, do you regard this expenditure an excellent use of taxpayer's money, good use of taxpayer's money, poor use of taxpayer's money, or very poor use of taxpayer's money?"[49] The response was such that only 28% of respondents thought that the expense was a good use of taxpayer's money, while 67% of respondents though it was a poor use of money.[50]

The role of vice-regals in Canada has become trivialized, I would claim, falsely seen as a strictly ceremonial institution. When vice-regals enter political debate, there is typically uproar, illustrating that the office is for the most part not a legitimate check and balance, both in the eyes of the people and by convention. As Lowell Murray intones, "Most people wrongly believe it [the vice-regal offices] to be completely ceremonial and utterly powerless. That is the fault of successive generations of politicians, of an educational system that has never given the institution due study, and of past vice-regal incumbents themselves."[51]

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[47] Murray, Lowell. "Which Criticisms are Founded?" From Joyal, Serge (ed.) Protecting Canadian Democracy: The Senate You Never Knew. McGill-Queen's University Press: Montreal, 2003. p. 136
[48] http://rickmercer.blogspot.com/
[49] The Strategic Counsel. A Report to the Globe and Mail and CTV: Perceptions Toward Governor General. September 25, 2005. www.thestrategiccounsel.com
[50] Ibid.

Some basic Canadian political primers, such as Ricker, Saywell and Parson's How Are We Governed in the '90's? help perpetuate these falsehoods, "as we have seen, neither the Queen nor the Governor General can act on their own."[52] This same book mentions just some twenty pages later that in fact the Governor General can act on his or her own in the event of the death of the Prime Minister and can decide on a Prime Minister in the event that two most popular political parties have the same number of seats in the House of Commons.[53] This contradiction is endemic of a schizophrenic perception in Canada of the role of vice-regals.

The result has been that vice-regals are viewed as non-partisan and devoid of any political consciousness. They are seen as strictly forbidden to speak politically. This is despite the fact that there are no legal restrictions for Lieutenant Governors or Governors General on speaking their mind on political issues. This issue came up in a debate over the role of the Governor General between Rt. Hon Pierre Trudeau and the Rt. Hon John Diefenbaker in the House of Commons in 1970. Diefenbaker asked Trudeau, "Has [there] been any change in the traditional policy under which the Queen and her representative in making speeches that in any way contain material that may be of a political nature," or was there a new requirement that the monarch or the Governor General, "deliver them provided they have the consent and approval of the Prime Minister?"[54] Trudeau's reply to Diefenbaker was slightly confused, "…there has been no change in policy, whatever it was, in regard to the Queen and the government."[55]The question Diefenbaker asked was obtuse, as Trudeau was even confused at what the policy was or even if there was one. What was the traditional policy? As W.A Matheson intones,

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[51] Murray, Lowell. "Which Criticisms are Founded?" From Joyal, Serge (ed.) Protecting Canadian Democracy: The Senate You Never Knew. McGill-Queen's University Press: Montreal, 2003. p. 136
[52] Ricker, John and Saywell, John with Parson, Jim. How Are We Governed in the '90's? Irwin Publishing: Toronto, 1991. p. 88
[53] Ibid. p. 109-110
[54] Canada. House of Commons, *Debates*. (April 29, 1970) p. 6409
[55] Ibid.

"the reply is indicative of the relative importance of the office in the operation of cabinet government in Canada at the present time."[56]

Nonetheless, it is common with the announcement of a new Lieutenant Governor or Governor General to have newspaper articles describing how that vice-regal will have to be mindful not to say or do anything that could be perceived as political or partisan. For instance in 1984, when it was announced that Helen Hunley was to be Alberta's next Lieutenant Governor, the Edmonton Journal ran an article entitled "Tongue in check for Hunley," arguing that Governor's cannot wade into political debate.[57] Similarly, when Bud Olsen was appointed in 1996 the Edmonton Journal headline read, "Olson says he'll learn how to keep mum."[58]Some media statements are in obvious contradiction with the constitution and serve to create confusion on the role of vice-regals in Canada, diminishing their already waning power. Barry Cooper and David Berscuson argue that, "…the Crown exercises its prerogative power only on the advice of the first minister, the ability of the representatives of the Crown to act without advice is restricted to extraordinary circumstances…the words ordinarily spoken by the representative of the Crown are even less weighty than the utterances of Her Majesty on the benefits of homeopathic medicine."[59] One article by the Barrie Examiner noted, "Although she [Governor General Adrienne Clarkson] can't force an election, the Governor General can advise the Prime Minister to dissolve Parliament and call for a vote. He doesn't have to follow her advice."[60] The Governor General can force an election, and ensures that the Prime Minister adheres to vice-regal advice. The Governor General, not the Prime Minister dissolves the Parliament. Doug Fischer of Southam News has echoed a commonly held sentiment, "…steering clear of trouble is the principal measure of vice-regal success."[61] This is troubling considering that the job of vice-regals is to adjudicate disputes as part of their Constitutional and legal mandate, not to avoid them.

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[56] Matheson, W.A The Prime Minister and the Cabinet. Methunen: Toronto, 1976. p. 11

[57] Barrett, Tom. "Tongue in check for Hunley. " Edmonton Journal. December 3, 1984.

[58] Alberts, Sheldon and Geddes, Ashley. "Olson says he'll learn how to keep mum; [FINAL Edition]" Calgary Herald. Calgary, Alta.: Mar 08, 1996. p. A.12

[59] Cooper, Barry and Bercuson, David. "Chrétien made mistake in appointing Clarkson; [Final Edition]", The Herald. Calgary Herald. Calgary, Alta.: Sep 15, 1999. p. A.22

[60] "Chaos Reigns over Ottawa: Paul Martin calls Governor-General amid demands for action. " Examiner. Barrie, Ont.: May 13, 2005. p. A.1

Some vice-regal representatives have also held similar views on their role. Soon after being appointed as Alberta's Lieutenant Governor in 1984 Helen Hunley opinioned that it was not the role of a Lieutenant Governor to comment on political matters,

> Most things I do have strong opinions about but if an issue was before the House, I would not express it. It would not be proper...as the Queen's representative I must be impartial. It's a totally apolitical job[62]

However, it was apparent that Hunley was paying lip service to this ideal, as she continued to serve as President of the Alberta Conservative Party even after the announcement of her appointment. Hunley did concede that hew appointment would not have been likely had she been a member of New Democratic or Liberal party, rather than the Conservative party, but added she would like to believe that "I was picked for the position not because I'm a Conservative or a woman."[63]

After announcing his resignation, Governor General Romeo LeBlanc, would demonstrate similar views of the inappropriateness of vice-regals intervening in political matters during an interview at the end of his term in 1999,[64]

> If you think you have a lot of authority vis-à-vis the government...I have the impression that any governor who's that naïve would be in line for some surprises...That's not our role. We're not elected, we don't have any authority. We have a moral authority, if I can say that. We can encourage things.[65]

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[61] Fischer, Doug. "Hnatyshyn was vice-regal hit: But Governor-General is leaving an office diminished by politics"; [Final Edition] Calgary Herald. Calgary, Alta.: Feb 5, 1995. p. A.10

[62] Barrett, Tom, "Tongue in check for Hunley. " Edmonton Journal. December 3, 1984.

[63] Ibid.

[64] LeBlanc had resigned as Governor General citing the millennium festivities which would be too onerous, "I didn't want to be on the job come the millennium year. It will be very demanding. " These positions are not universally shared among Canadian vice-regals as there is plenty of evidence of Lieutenant Governor and Governors General that felt otherwise.

[65] Richer, Jules. "LeBlanc says he wasn't that powerful;" [Final Edition]. Calgary Herald. Calgary, Alta.: Oct 2, 1999. p. A.3

LeBlanc's comments were widely interpreted as a warning to the incoming Adrienne Clarkson who had intimated that she would be inclined to speak her mind on ethical issues.[66]

B. Negative reactions to Governors General and Lieutenant Governors

There are instances in which some vice-regals are more outspoken than their counterparts are. Some Governors General and Lieutenant Governors feel bound by the purported rules that govern them while others do not. Some take their role as Constitutional guardians seriously while others do not. Dr. David Smith supports this sentiment noting that, "each Governor General defines his or her own job and the bounds within which they operate."[67] Jules Léger noted similarly, "…every Governor General brings to his task a distinctive personality that inclines him toward particular problems or aspects of our national life, or towards particular groups of his fellow citizens, and in so choosing he enjoys the fullest latitude."[68] Lieutenant Governor John Black Aird, a former Lieutenant Governor of Ontario, defined the role of the Lieutenant Governor as follows:

> A Lieutenant Governor serves in a dual capacity: first, as representative of the Sovereign for all purposes of the provincial government, and second, as a federal officer in discharging certain functions of the Sovereign. The roles are not clearly defined and are largely dependant on the common sense and energy of the incumbent.[69]

It is helpful to document some negative reactions to instances where vice-regals were viewed to be operating outside their purview. It should be noted in many of these instances, the negative reactions to the vice-regals was often overzealous. John Ward has cited Allen Tupper who has argued that high profile Governors General (by extension Lieutenant Governors also) become the target of republican criticism, such as espoused by the former Finance Minister John Manley in 2002.[70] This criticism has led to Governors General defending themselves something they are forced rather than want to do. For instance, Adrienne Clarkson would be forced to defend herself against criticism of her spending, something she would later muse that should have been done by the federal government. This criticism of vice-regals as noted by Andrew Cohen "plays to our worst instincts, it taps a reservoir of resentment, and best of all, the Governor General cannot respond to it. Much as she would like to get even, she knows a catfight with a newspaper diminishes the decorum of the office. Short of a lawsuit, she has to take it."[71] The result is that for the media the Governor General and the Lieutenant Governors are easy prey. They are the closest thing to royalty we have in Canada and are often flashy and glamorous. Michael Cross has noted that,

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[66] Ironically, LeBlanc's sentiment on the role of the Governor General was symbolically demonstrated with his alteration of the Governors General official crest. LeBlanc ordered a more polite and friendly lion for the crest. The old lion was de-clawed and its protruding tongue, which symbolized "the readiness of the animal to be in the service of the bearer," was removed. The lion following LeBlanc's perception Governor General would be silent. This change was later reversed by Adrienne Clarkson.

[67] Thorne, Stephen. "What's all the fuss about? Governor General dogged by controversy but experts say she is only enhancing role set by her predecessors. "Standard. St. Catharine's, Ont.: Jan 22, 2001. p. D.4

[68] Léger, Jules. Léger, Jules : Governor-General of Canada 1974-1979 A Selection of his Writing on Canada. La Presse: Ottawa, 1982. p. 80

[69] Aird, John Black. The Honourable. Loyalty in a Changing World: The Contemporary function of the Office of the Lieutenant Governor of Ontario. Queen's Printer of Ontario, 1985. p.3

> I think the Governor General is a high-visibility position and people are bound periodically to go after that kind of position. These kinds of financial issues are, in many respects, penny ante, but they're the sort of thing people can grasp quickly and there's political points to be made out of it [72]

If this holds true, case studies may also demonstrate that the roles of the Governor General and the Lieutenant Governors have been arbitrarily defined. In a system of government where Constitutional law is not only derived from written law, but through tradition and customs it may be interesting to note the purported rules that bind Canada's vice-regals were defined arbitrarily as well.

The Gay Wedding Issue

In 2001, Kevin Bourassa was getting married and like thousands of Canadians, he decided to invite the Governor General to his special day. Because of the sheer volume of invitations that the Governor General receives, a polite rejection is usually sent in response. Kevin Bourassa, like many others, received this polite rejection from Clarkson's office. Such a response should have been an innocuous event as thousands of these automatic replies are sent out every year. However, this response soon made the national news and the Rt. Hon Adrienne Clarkson was criticized. The hullabaloo began when it was found out that Kevin Bourassa's marriage would be same-sex. This was an issue of great political controversy and is routinely debated in the House of Commons. The polite decline issued by Rideau Hall was inaccurately viewed as a political statement of support for same-sex marriage. Many Canadians opposed to same-sex marriage rapidly expressed their disproval, without realizing that the polite decline was most likely the actions of a low-ranking employee at Rideau Hall, if not a computer-generated automatic reply, not some radical political statement by the Governor General herself.

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[70] Ibid.

[71] Cohen, Andrew. "It's open season Clarkson" The Ottawa Citizen. Ottawa, Ont.: Jan 25, 2005. p. A.14

[72] Ward, John. "Clarkson unfairly condemned for $1M trip, academics say. " Edmonton Journal. Edmonton, Alta.: Sep 29, 2003. p. A3

Nonetheless, Grant Hill, the Canadian Alliance Critic for Family Values, chortled, "There's nothing subtle about it. This is like a baseball bat. She's acting in a way that is politically activist."[73] Maurice Vellacot, another member of Canadian Alliance, promised to introduce a motion to censure the Governor General and advised Clarkson to "resign immediately and seek public office, if she desired to make political comments."[74] The general secretary for the Canadian Conference of Catholic Bishops Msgr. Peter Schonenbach angrily wrote to Prime Minister Jean Chrétien arguing, "Canadians should be able to expect the Governor General to respect and uphold their basic values and laws."[75]

Desmond Morton, the director the Institute for Canadian Studies at McGill University, came to Clarkson's defence,

> We don't choose a eunuch…She's out there making people feel part of the country. That's certainly what the governors general I've known have done. And that sense of inclusiveness is offensive to people who want other people excluded.[76]

This case demonstrated the willingness to criticize the Governor General of Canada at the slightest provocation. Even an innocuous event could be transformed into a vice-regal scandal. The media failed to assess the facts. They merely saw the potential for a scandal and thought shamefully to thrust the Governor General into a needless debate. The opposition perhaps aware of the Byng controversy of 1926 thought to capitalize politically by citing the spectre of political interference by the Crown.

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[73] Blackwell, Tom. "Clarkson blasted over note to gays: Greetings sent to same-sex wedding out of line -- critics;" [Final Edition] Edmonton Journal. Edmonton, Alta.: Jan 16, 2001. p. A.6

[74] Ibid.

[75] Lakritz, Naomi , Governor-General was just being polite; [Final Edition] Calgary Herald. Calgary, Alta.: Jan 18, 2001. p. A.21

[76] Thorne, Stephen. "Clarkson's activism defended; 'She's out there making people feel part of the country. " [Final Edition] The Spectator. Hamilton, Ont.: Jan 22, 2001. p. C.03

The Smoking Swearing-in-Ceremony

On January 21, 2005 during his installation ceremony at Government House, Alberta's new Lieutenant Governor, Norman Kwong, provoked controversy over his comments on Alberta's proposed smoking ban. Kwong openly disagreed with Premier Klein who felt that a province-wide smoking ban in public places and work environments was unfair. Klein had noted, "Let's not be overboard on this issue."[77]The Premier also felt that those employed in a smoking environment should find another job if they found the practice distasteful. The new Lieutenant Governor hoped his comments would encourage youngsters not to adopt the harmful practice, "I hate to jump on people, the way they live their lives…But if you asked me if I was in favour or not, I think I'd have to be in favour of a ban."[78] While these comments were contrary to the Premier's position they did not conflict with the established positions of several government departments and organizations, which found the proposed ban helpful to the general health of Alberta's citizenry. Iris Evans, Klein's own health minister, had proposed the smoking ban. The proponents for the smoking ban included AADAC (Alberta Alcohol and Drug Abuse Commission) whose senior manager for tobacco reduction Lloyd Carr argued, "The more you limit the places where people can smoke, the more quit attempts they will make."[79] The Chief Medical Officer for the Capital Health Region concurred with the ban, "In terms of preventing exposure to environmental (second-hand) tobacco smoke, particularly for people who are working in places like bars, I think it is important to have a smoking ban."[80]

Under such pressure, Klein was forced to admit that he was in the minority and rather than dismissing the smoking ban with an executive veto. Klein promised instead to consult his caucus, "We will have a debate through the (standing) policy committees, and I will make sure that those are open, and then in the legislature."[81] In an effort to ensure that children were not becoming smokers, Kwong provided open support to a majority in favour of a ban helping to force a more democratic resolution of the issue. And despite provincially employed experts weighing in on the issue to the detriment of the Premier's position, somehow the Lieutenant Governor's comments were seen as inappropriate. The Regina Leader Post reported that "newly appointed Alberta Lt.-Gov. Norman Kwong shunned royal protocol and waded into the contentious smoking debate Thursday, publicly disagreeing with Premier Ralph Klein's stand opposing a province-wide ban on smoking in public places and at work."[82] Larry Johnrude and Bill Mah of the Edmonton Journal noted almost verbatim, the criticism of the Regina Leader Post noting Kwong "shunned royal protocol and made an unusual public pronouncement."[83] Clearly, the shunning of royal protocol was a disastrous offence from the media's perspective, but the shunning of democratic debate by the Premier was less so.

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[77] Johnsrude, Larry and Bill Mah. "Kwong comes down on side of smoking ban"; [Final Edition] Edmonton Journal. Edmonton, Alta.: Jan 21, 2005. p. A.3
[78] Ibid.
[79] Ibid.
[80] Ibid.

The criticisms were echoed by members of the general public including one Thomas Koch of Spring Lake, Alberta, who wrote an editorial to the Edmonton Journal on January 23, 2005, criticizing the Lieutenant Governor,

> Under a Constitutional democracy, the role of the monarch and her representatives is largely ceremonial and involves political activity only in dissolving the legislature and swearing in of democratically elected representatives…Kwong might consider cutting a few ribbons, hosting a few afternoon teas and leave the politics to the voters and their elected representatives.[84]

Koch had failed to note that it was the democratic majority that favoured the ban, a fact that would be subsequently seen when the smoking ban was passed in the Legislature. The whole controversy appeared to be exaggerated. The Lieutenant Governor was not going against the democratic process. He was supporting it. The Premier in contrast, is first among equals within his caucus and does not have the right to govern without the consent of the elected members of the Legislative Assembly.

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[81] Thomson, Graham. "Ralph left gasping; [Final Edition]." Leader Post. Regina, Sask.: Jan 25, 2005. p. B.7

[82] "Kwong enters smoking debate; [Final Edition]" Leader Post. Regina, Sask.: Jan 21, 2005. p. F.5

[83] Johnsrude, Larry and Mah, Bill . "Kwong comes down on side of smoking ban":; [Final Edition].Edmonton Journal. Edmonton, Alta.: Jan 21, 2005. *p. A.3*

[84] Koch, Thomas. "A Matter of opinion: Lt.-Gov. Kwong overstepped his bounds;" Edmonton Journal, Edmonton, Alta January 23, 2005. p. A. 13

Revenge of the Gardener?

The tenure of Her Honour Lois Hole was unique. It juxtaposed a lifelong Liberal against a Conservative Alberta government that borrowed heavily on neo-conservative policies.[85] Since 1971, the Alberta electorate had routinely rewarded the Conservatives with large majorities. Despite all this, Hole remained hugely popular throughout her term possessing an approval rating that the popular Premier, Ralph Klein would have envied. Throughout her tenure, Her Honour Lois Hole chose to transform her popularity into political capital and champion issues she felt passionately about, such as health, education and the arts.

Despite her popularity or perhaps because of it, this course provoked criticism. Early in her term, Hole inadvertently prompted a fierce political debate over the role of the Lieutenant Governor in Alberta with the controversy over her comments on *Bill 11*, which would allow the privatization of some health care services. As Edward McWhinney writes, "As one of the more intellectually independent and innovatory occupants of that office, she had publicly suggested that she would like to speak to Premier Ralph Klein about this politically contested Bill 11."[86] These comments came on March 15, 2000 during a charity event in Red Deer. Hole noted while her family typically chose not to talk politics with her, "My son asked: `What will you do with the health bill?"[87]

However, this was not meant as a threat against the Premier in the sense that Her Honour would withhold assent. As Ken Munro notes: "The innocent comment soon became blown out of all proportion with some mischievous individuals in the press suggesting that the Lieutenant Governor was going to refuse assent if "Bill 11" passed through the Legislative process."[88] Nancy Macbeth, the Liberal leader of the Official Opposition, noted that while Hole's comments were unusual for a Lieutenant Governor, they nonetheless did have merit: "She's close to the people and hearing that they're saying and the government isn't."[89] While this was clearly not Her Honour's intention there was nonetheless debate on whether she would have been within her rights to express her personal thoughts on the matter.

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[85] In his letter to the editor Koch, Thomas also alluded the activities of Norman Kwong's predecessor the highly popular Lois Hole, Alberta's Lieutenant-Governor from 2000 till her death in January 2006. Ironically, Kwong had promised to be less outspoken than her Honour Lois Hole and yet had not made his way out of his swearing-in ceremony at Government House without causing controversy.

[86] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005. p. 93-94

[87] "Hole Hints and involvement"; The Calgary Herald. Calgary, Alta.: March 17, 2000 p. A.6

The ability of the Lieutenant Governor to refuse the advice of the Premier on assenting to legislation was at the time debated by Constitutional scholars such as Allan Tupper, who noted "…my view is that a Lieutenant Governor not giving assent to a bill passed by a majority government would be unconstitutional."[90] While the power to refuse Royal Assent or to reserve legislation is still part of the *Constitution Act*, 1867, Tupper noted, "I would go past that and say that it's no longer an operative part of the Canadian Constitution."[91] However, laws are not made inoperative by lack of use; laws must be amended or repealed. An apt comparison for this argument can be used for the *Emergencies Act*, the successor to the *War Measures Act,* which can be invoked only in case of an emergency. Just because an emergency has not arisen does not mean that should an emergency arise that the legislation would not be used to its full force. David E. Smith gave the example of the appointment of extra senators. He noted that "in regard to s. 26 of the *Constitution Act*, which provides for the appointment of extra senators and which until Mr. Mulroney invoked it had rested dormant for over a century…"became an important factor is pursuing government policy.[92]The job of vice-regals in Canada should be viewed similarly.

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[88] Munro, Ken. The Maple Crown in Alberta: The Office of Lieutenant Governor 1905-2005. Trafford: Victoria, 2005. p. 107

[89] Geddes, Ashley. "Lt.Gov. won't block passage of health bill. " Edmonton Journal. Edmonton, Alta.: March 18, 2000 p. A.1

[90] Jeff Holubitsky. "Experts doubt Hole would kill bill. " Edmonton Journal. Edmonton, Alta.: March 17, 2000 p. A.18

[91] Ibid.

[92] Smith, David E. "Comment Re: The Royal Prerogative and the Office of the Lieutenant Governor. " Canadian Parliamentary Review. Vol. 23, no. 3 2000 p.

Despite this example, the Edmonton Journal wrote in an editorial, "As Lieutenant Governor, it is her job -- indeed, her primary responsibility -- to remain aloof from the political debates that occasionally divide members of the legislature and the people who democratically chose them in an election."[93] However, the job description provided for the Lieutenant Governor by the B.N.A Act, 1867 does not confirm this sentiment. Hole's comments were merely conveying to the public that as Lieutenant Governor she would be ensuring that the Premier realized that the legislation was controversial and that there was widespread opposition to it. She ensured that the Premier would have the best interests of Albertans in mind.

Ashley Geddes another reporter with the Edmonton Journal noted Lois Hole's Bill 11 comments were a "break with tradition."[94] However, where did this so-called tradition originate? The reactions provided by political observers seemed rather unusual considering that Alberta has had a tradition of interventionist Lieutenant Governors since it had become a province. In 1910, Lieutenant Governor George V. Bulyea, Alberta's first Lieutenant Governor, forced Alberta's first Premier Alexander Cameron Rutherford to leave office over the Great Waterways Railroad Scandal. As Ken Munro notes, the charges levelled against Rutherford were "unfounded," but nonetheless "the Lieutenant Governor helped engineer the dismissal of Rutherford."[95] Bulyea unilaterally appointed the next Premier of Alberta, Arthur Sifton, despite the fact that the Alberta Liberal Party had voiced another preference, particularly William Cushing.[96] In 1937, Lieutenant Governor John C. Bowen refused to give Royal Assent to three bills proposed to him as he felt they were *ultra vires*. The Supreme Court of Canada and no less than the Judicial Committee of the Privy Council in Westminster would later confirm that the bills were in fact *ultra vires*. In 1938, the same Lieutenant Governor nearly dismissed Premier William Aberhart after the vice-regal residence was closed and several of his staff fired. In the 1970s, Lieutenant Governor Ralph Steinhauer would muse publicly that he was considering refusing Royal Assent and would clash with the Premier Peter Lougheed over native rights. In the 1980's, Lieutenant Governor Frank Lynch Staunton also mused about refusing Royal Assent. In the 1990s, Lieutenant Governor Gordon Towers refused to sign an order-in-council and his successor Bud Olsen publicly mused following in his predecessors footsteps. However, this history has been forgotten. In its place, a false perception of the role of vice-regals has been implemented. This is a situation not unique to Alberta. Clearly, this tradition is more rooted than simply political myths.

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[93] "Lois Hole made an error. " Edmonton Journal, Edmonton, Alta.: March 18, 2000 p. A.18

[94] Geddes, Ashley. "Lt.Gov. won't block passage of health bill. " Edmonton Journal. Edmonton, Alta.: March 18, 2000 p. A.1

[95] Munro, Ken. The Maple Crown in Alberta: The Office of Lieutenant Governor 1905-2005. Trafford: Victoria, 2005. p. 94

[96] Ibid.

The Origins of Politically Incompatible Lieutenant Governors and Governors General

Within the Canadian political mindset, there exists a perceived incompatibility of vice-regals intervening in political matters. This sentiment is deeply rooted in Canada's history. This sentiment did not begin the aftermath of the Byng-King episode, which has played a pivotal role in the modern Canadian political mindset. Indeed, criticism of the Governor is not a new or novel phenomenon as it was evidenced soon after the capitulation of New France.

The politically wise decisions of Britain, particularly its Governors James Murray and Guy Carleton, consenting to religious, linguistic and cultural rights for the French *Canadiens* with the fall of New France contributed to the loyalty and success of Canada as a colony. Although the instructions issued to the new civil Governor General was an attempt to assimilate the *Canadien*, it was not enforced by Governor James Murray. Murray instead decided to show a compassionate sensitivity to the conquered. He acted this way despite enormous pressures brought to bear on him by a miniscule English merchant element. Murray felt that the French *Canadien* were, "perhaps the best and bravest race" on the earth, while the English merchant minority was, "the most cruel, ignorant, rapacious fanatics who ever existed."[97] Murray was highly criticized by the English minority, some of whom called for his resignation owing to his defence of the rights of the new British subjects. This same minority did not think too kindly of the efforts of Murray's successor, Guy Carleton, spent a significant time of his Governorship, some four years, in London lobbying for the rights of the French *Canadien*. The Colonial Office having enough of Carleton's pestering put his ideas into law with the implementation of the 1774 Quebec Act. The Quebec Act of 1774 had provided for generous freedoms and rights for the French *Canadien*. Moreover, the spirit of the Quebec Act had already been largely enforced for some time. As Marcel Trudel says,

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[97] Library and Archives of Canada. James Murray Dictionary of Canadian Biography Online. http://www.biographi.ca/EN/ShowBio.asp?BioId=36207

> The King's instructions to Murray in 1763 and Carleton in 1768 would have proven harsh to *Canadien*s had they not been moderated in practice...they allowed the Catholic hierarchy to acquit itself of its customary duties...By the time a new government had been designed for Quebec in 1771, the rights it officially proposed had already been accorded in fact: freedom of religion and French Civil law.[98]

More legitimate complaints would come with the successors of Carleton and Murray, as subsequent Governors would be less concerned with protecting minority or even majority rights,

> For all the governor's personal authority, his broad powers seemed arbitrary instead of dignified-and the elected assembly had enough sense of its own importance to resent the limitations upon it. So governors and assemblies fought, and in the Canadas the fight veered outside the confines of legitimate government.[99]

The machinations of rebellion that came in 1837-38 were highly influenced by a lingering frustration at the lack of responsible government and the presence of near tyrannical Governors. London could not exclusively send the likes of Carleton and Murray. Governor Craig served as a good contrast to them because he cared little for the will of the majority. Between 1808 and 1810 Craig suspended the Lower Canada Assembly three times, each time hoping the *Canadiens* position would be weakened and the Anglo minority strengthened. Craig also took to arbitrarily arresting *Canadien* leaders, such as Pierre Bedard. Craig also took to shutting down the press of *Les Canadien* in an effort to muzzle criticisms. Craig hoped to assimilate the *Canadiens*. He probably would have gone much further in his persecution had it not been for the rights and protections given by the Constitutional documents. *The Quebec Act* of 1774 and *Constitution Act* of 1791 limited what the Governor could do. Yet, the *Constitution Act* of 1791 was also a component of the problem. The elected Assemblies provided to both Upper and Lower Canada in 1791 ultimately answered to a legislative council appointed by the Governor. In the period before the 1837-38 Rebellion, Governors appointed Anglo-merchants to the Legislative Council, but not *Canadiens* who represented the majority. The Legislative Council would block legislation proposed by the *Parti Patriote* and the Governor refused Royal Assent to *Canadien* legislation.

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[98] Source unknown possibly from: Normand Lester. The Black Book of English Canada. McClelland & Stewart: Toronto, 2001.

[99] Moore, Christopher. 1867: how the Fathers made a deal. Toronto: McClelland & Stewart, 1997. p. 6

By 1834, the *Parti Patriote*, led by Louis Joseph Papineau, had gained a majority in the assembly. Papineau proposed ninety-two Resolutions, which included calls for the implementation of responsible government. The *Parti Patriote* waited three years for a response from Britain, as the ninety-two Resolutions would require a change or a completely new Constitution. The response from Britain was disheartening to the *Canadiens* as the Imperial Government refused responsible Government. This refusal of responsible government was not limited to Lower Canada. Peter Hogg noted that,

> In every colony there was a chronic conflict between the assembly and the governor (and his executive council). In Upper and Lower Canada, these frustrations led to armed rebellions in 1837…Lord Durham reported in 1839. He accurately identified the causes of conflict between assembly and executive, and he recommended the institution or responsible government: in Durham's view, the Colonial Office should instruct each governor to appoint to his executive council only persons who enjoyed the confidence of a majority of the assembly.[100]

It took a rebellion before responsible government would be legitimately considered.

The adoption of responsible government did not come immediately after Durham's report. In fact, the political situation after the rebellions was not significantly different than it had been prior to it. As Christopher Moore notes, "When the rebellions were crushed, the governors emerged stronger then ever."[101] This led prominent political figures in Canada to champion the cause of responsible government. George Brown was one of those politicians and he believed that,

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[100] Hogg, Peter W. "Responsible Government. " From R.S Blair and J.T McLeod. The Canadian Political Tradition. Nelson Canada: Toronto, 1989. p. 17

[101] Moore, Christopher. 1867: how the Fathers made a deal. Toronto: McClelland & Stewart, 1997. p. 6

> Politicians elected by the voters, not a governor appointed from Britain, must control the making of domestic policy. Specifically, the governor should defer in policy matters to his executive committee-the Cabinet, as it was already being called….It is now hard to imagine the Canadian Governor General being descended from powerful, policy making autocrats. But in 1845 there were such governors, and the curbing of their authority was the hottest of political issues.[102]

Christopher Moore notes that, "by the 1860's responsible government was no longer controversial."[103] By this time the works of Bagehot and others who supported responsible government came into vogue. His maxim on the monarchy from his work The English Constitution became frequently cited in Canada and the Commonwealth,

> To state the matter shortly, the sovereign has, under a Constitutional Monarchy such as ours, three rights – the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others. He would find that his having no others would enable him to use these with singular effect. He would say to his minister: "The responsibility of these measures is upon you. Whatever you think best must be done. Whatever you think best shall have my full and effectual support. But you will observe that for this reason and that reason what you propose to do is bad; for this reason and that reason what you do not propose is better. I do not oppose, it is my duty not to oppose; but observe that I warn." Supposing the king to be right, and to have what kings often have, the gift of effectual expression, he could not help moving his minister. He might not always turn his course, but he would always trouble his mind.[104]

The Bagehot ideals have taken powerful shape, so much so that some Constitutional scholars would argue that they are convention, or part of unwritten constitution of Canada. However, this is a bit odd considering that Bagehot's comments did not represent the political reality of the time he wrote these words. As W.A Matheson has noted, "the prestige and mystique surrounding the throne in Great Britain enabled Queen Victoria to interfere in the affairs of her Cabinets, and her influence and views had to be taken into account when the cabinet was determining policy."[105] Bagehot's ideal was simply that: an ideal. However, as time passed on this ideal became more and more relevant. But, it was only well after Bagehot wrote the English Constitution that his advice was actually heeded. The sentiment espoused by Bagehot is adequate for normal operations and circumstances of the Constitution, but it should not be regarded anything more than it was intended, as advice. Bagehot in his critique of the monarch perhaps failed to see a danger in Canada's contemporary era: the democratic deficit or the over concentration of power in the Office of the First Minister.

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[102] Ibid. p. 5

[103] Ibid.

[104] Walter Bagehot. The English Constitution. ocserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/bagehot/constitution.pdf

[105] W.A. Matheson. The Prime Minister and the Cabinet. Methuen: Toronto, 1976. p. 8

An argument can be made that elected executives have wrongfully attempted to take and diminish the power of the Crown. They have subverted it to enhance their own interests. With dwindling voter turnout and with the political winners earning less than the majority of eligible votes these politicians clearly do not have the legitimacy or the political support to do so. What has happened is that these usurpers have relegated and disseminated a role for Canada's vice-regals contrary to the Constitution, both written and convention. The uncontested role of Canada's vice-regals is a fraction of what it should be.

The Liberal and Republican Myths

There are some ideological components in these myths of vice-regals as impotent. This includes attempts by elected political executives to usurp the Crown. One source has been an Americanized republican sentiment that is supported by some Canadians. One prominent example is Dianne Francis, an American import, who presumes to tell her adopted country of the inferiorities relative to the United States. Included is Canada's monarchical system, as Francis has noted,

> The Yanks eliminated such purse parasites by throwing the tea in the harbour. The French dealt with their aristocracy in another way. So I'm totally biased against kings and queens even though, to become a Canadian citizen, I had to swear allegiance to Britain's Crown. I hated that part. Any monarchy is an embarrassment. No self-respecting egalitarian society should enshrine inherited

> privileges for a monarch or its representatives. A monarchy sets the wrong tone for a modern state. Monarchies are medieval.[106]

This sentiment is not limited to American interlopers. On October 4, 2002, while the Queen was visiting Canada, the Deputy Prime Minister, John Manley, was questioned in French if Canada needed a Queen. Manley responded that,

> It is not necessary, I think, for Canada to continue with the monarchy. I have always said that first I think Queen Elizabeth is doing a good job. Personally I would prefer it if we could have a uniquely Canadian institution after Queen Elizabeth.[107]

Manley noted that perhaps Celine Dion or some other prominent Canadian could fill the role of the Queen.[108] However, the republican sentiment does not represent the majority of Canadians. Even in Australia, which boasts a much stronger republican movement referendums calling for the abolition of the monarchy, have been defeated. Nonetheless, this ideology partially explains just some of the public and media disconnect with the monarchical system in Canada and the use of its vice-regals.

Another and more potent ideological component has been the one formed by the Liberal party of Canada. This is not an overt or official policy. It is important to make the distinction that not all Liberals share this belief. However, Eugene Forsey, a Liberal Senator himself, scoffed at the "Liberal party folklore" of the vice-regals as rubber stamps.[109] The roots of these Liberal myths are from the Byng-King conflict. Historically and even contemporarily, King represents a Liberal hero, a visionary who was Canada's leader during the Second World War and served as Prime Minister a record four times. The admission that King was wrong and was needlessly abusing the Governor General for political gain would irrevocably deconstruct this Liberal hero. King's political exploitation of the Governor General would not be limited to the King-Byng dispute in 1926. Mackenzie King would try for a round two in 1935, this time attempting to provoke the King of Canada George V into a Constitutional Crisis over the role of the Governor General.

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[106] Francis, Diane. "Time to dump the Monarchy: No egalitarian society should enshrine inherited privileges. " Edmonton Journal. Edmonton, Alta.: Oct 29, 1999. p. A20

[107] Jonathan Kay. "I've got a lot of time for John Manley. " National Post. Don Mills, Ont.: Oct 15, 2002. p. A.2

[108] Ibid.

[109] Hodgetts, J. F. The Sound of One Voice: Forsey, Eugene and his Letters to the Press. University of Toronto Press: Toronto, 2000. p. 119

D.A Low provides evidence of Liberal Party ambivalence to admitting King's faults even when it was to their benefit. This was evidenced in 1985 when the Lieutenant Governor of Ontario was planning to appoint Liberal David Peterson as the Premier of Ontario. This may have meant refusing a dissolution request by the Conservative Premier Frank Miller. This would be essentially the same scenario as presented in the King-Byng and as Low notes, "...and every Liberal had been taught that Mackenzie King was constitutionally correct in arguing that Byng had no discretion. Any Liberal would be in agony at such a dilemma."[110] Another reason for why the Liberals might be more republican then a more conservative political party was influenced by the underlying ideology of the Liberal party: liberalism. Liberalism finds the concept of a monarchy incongruent with a democratic society.

The Liberal Party of Canada, in power for the majority of the 20th Century and a significant portion 21st Century already, has indirectly perpetuated this false history and presented an ideological drift, which has been commonly adopted. Many would complain, as Diefenbaker did earlier on, that Liberals such as Pierre Trudeau had physically erased many of Canada's monarchical linkages. For instance, the Royal Canadian Air Force (RCAF) and the Royal Canadian Navy (RCN) would be lumped together as the Canadian Forces. Why not the Royal Canadian Forces? Whether intended or not, when these changes are made, the legitimacy of the Governor General and Lieutenant Governors becomes less significant, in fact they seem archaic. The comments by John Manley also indicate that some Liberals might prefer that the vice-regals would position be purely ceremonial. In this instance, the Prime Minister and Premier would gain even more power.

There are some clear elements in ideological differences to some extent between Liberals and Conservatives on the issue. This difference is somewhat apparent in calls by

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[110] Low, D.A. Constitutional Heads and Political Crises Commonwealth Episodes, 1945-85. St. Martin's Press: New York, 1988. p. 231

Stephen Harper for vice-regal intervention when he was Leader of the Opposition in 2004 and 2005. Harper perhaps following Diefenbaker's example defended the Queen from Manley's comments in 2002, "Having this debate while the Queen is here is…an embarrassment to the country…and to the Queen herself."[111] Nonetheless, it is necessary to deconstruct this Liberal and republican rooted myth as both myths have contributed to de-legitimize the institutions of the Crown in Canada.

C. Uncontested role of the Governor General and the Lieutenant Governor

In order to deconstruct these republican and Liberal myths, among others, it is necessary to establish some outliers. These can be made apparent with an examination of the uncontested role of the Governor General and Lieutenant Governor. Peter Noonan has noted a rather uncontroversial description of the duties of the Governor General:

> The Governor General's primary duty in the modern contest is to act as the Sovereign's representative in Canada, by exercising the powers conferred upon the office by the constitution, the statutes and the royal prerogative. In addition, the Governor General is responsible for keeping the Sovereign informed of Canadian affairs by means of regular and private letters.[112]

Linda Goyette has noted of the Office of Governor General, "[the] duties are mostly dry and ceremonial: receiving foreign dignitaries, decorating heroes, delivering the Speech from the Throne and of course, no unelected head of state should exercise real influence without a mandate from the people."[113] Goyette also noted the generally accepted role of the Governor General: "The Governor General can be more than the personal representative of the Queen in Canada. The limited powers include assertions of Canadian sovereignty, recognition of excellence, national identity, unity and leadership."[114]Earl H. Fry has ironically argued, "The Governor General does free the prime minister from some of the more onerous ceremonial functions by representing the government at the opening of the national flower show or other such momentous events."[115]

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[111] Harper,Maria McClintock. "Off with his head say Manley's critics. Edmonton Sun. October 8, 2002 p. 3

[112] Noonan, Peter. The Crown and Constitutional Law in Canada. Srpinoon Publications: Calgary, 1998. p. 113

[113] Goyette, Linda. "Clarkson will encourage and warn us; [Final Edition]. " Edmonton Journal. Edmonton, Alta.: Sep 10, 1999. p. A.20

[114] Ibid.

D. Preliminary Conclusions

This chapter has demonstrated that there is indeed a misconception on the role of the vice-regals in Canada. Vice-regals are often viewed as strictly ceremonial figures unable to intervene in any political matters. Vice-regals intervene and political sentiments arise, they are met with negative reactions from the media. Misconceptions presented by politicians, the media and even educators have influenced these reactions. However, when examined many of these criticisms directed at vice-regals, especially those from the media, can be found to be arbitrary. In fact, some instances of controversy have been overblown. For instance, the controversy surrounding the Governor General and same-sex marriage arose after the media interpreted the decline of a same sex wedding invitation as a political statement. However, the criticisms of vice-regals in Canada are not unique or even modern. Such criticisms can be traced to the fall of New France.

Additionally, some ideological components have contributed to the myths that surround the vice-regal offices. The republican ideology is an obvious contradiction of the monarchical system, and actively seeks its abolishment. The strongest critiques of vice-regals espouse this republican ideology. However, the anti-monarchical influence of liberalism is another source of criticism to vice-regal offices. The Liberal party of Canada throughout the 20th Century has adopted the ideology of liberalism. Monarchists would chastise Mackenzie King and Pierre Trudeau as closet republicans, and many of their actions in office gave credence to this notion.

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[115] Fry, Earl H. Canadian Government and Politics in Comparative Perspective. University Press of America: New York, 1984. p. 169

Chapter III. Checks, Balances, and a Legal basis for the Governor General and Lieutenant Governors in Canada.

A. Introduction

Phillip Day of the Canadian Press has given a good interpretation of the components of the Governor General. In 1990, he wrote of the newly appointed Governor General Ray Hnatyshyn, "in a strictly legal sense, Ramon John Hnatyshyn became the most powerful political figure in the country when he was sworn in Monday as Governor General," he then juxtaposed the strict legal role with the uncontested role, "In 1990 reality, Hnatyshyn's new job is more like Canada's goodwill ambassador to itself-a roving representative of Queen and country."[116] Day would also cite background documents that were provided at the installation ceremony which noted the considerable power of the Governor General, "He may appear to be so [a ceremonial figurehead] for consecutive decades but his latent powers continue to exist, like a safety valve that is never used as long as everything is in working order."[117] One uncontested view of the Governor General and the Lieutenant Governors in Canada has been taken from Bagehot's famous maxim on the monarchy, as vice-regals are expected to have "the right to be consulted, the right to encourage, the right to warn." [118] Ed Schreyer, a former Governor General, echoes this sentiment,

> Well, I don't think the role has changed since Confederation. There is a need to understand the role and I'm afraid that there has not been a clear understanding of the role of the Governor General over the years and decades, but basically the role of the Governor General is very much like that of the monarchy in the United Kingdom and so basically how do I summarize it I would say that the Governor General has the understood right to be consulted and to advise, the right to encourage and to warn the Prime Minister of the day.[119]

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[116] Day, Phillip. "Power amid the pageantry; Authority acts as safety valve; CANADA'S 24TH GOVERNOR-GENERAL; [Final Edition]" Edmonton Journal. Edmonton, Alta.: Jan 30, 1990. p. A.3

[117] Ibid.

[118] Walter Bagehot. The English Constitution. ocserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/bagehot/constitution.pdf

[119] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

From a perspective of the prerogative or latent powers of the Governor General and Lieutenant Governors there is fairly consensus that this power clearly exists on the books but it is limited by convention. The question is how far convention limits the exercise of the power of vice-regals.

B. The *Constitution Act,* 1867 and the Governor General

The *Constitution Act*, 1867 clearly outlines that Canadians live under a benevolent dictatorship, at least from a strict reading of the act. As Jacques Monet has written, "In a liberal, if somewhat far fetched interpretation of the Canadian constitution, the Governor General would have the right to disband the Canadian Armed Forces, pardon all prisoners, declare war or, as the price of peace, sacrifice any part of Canadian territory."[120] Any of these actions would be highly unlikely as of course the Governor General and the Lieutenant Governors are limited by convention, one of the most important of which is responsible government.

In the *Constitution Act*, 1867 there is no mention of a Prime Minister or Premier, but there is mention of a Governor General and Lieutenant Governors, which are conferred with exhaustive executive power. The Governor General exercises the executive power on behalf of Canada while the Lieutenant Governors exercise power on behalf of the constituent provinces. Section III of the *Constitution Act*, 1867 begins with outlining the executive powers for Canada, which under Section 9 were vested in Her Majesty: "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."[121] Section 10 notes that the Governor General carries out that offices authority in the name of the Queen,

> The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf of and in the Name of the Queen, by whatever Title he is designated.[122]

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[120] Léger, Jules. Jules Léger,: Governor-General of Canada 1974-1979 A Selection of his Writing on Canada. La Presse: Ottawa, 1982. p. 16
[121] *Constitution Act*, 1867
[122] Ibid. Sec 110

The central committee or council that was to advice the Governor General was not the cabinet but a larger body the Privy Council, as outlined in Section 11, which established the Privy Council,

> There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.[123]

Section 12 of the *Constitution Act*, 1867 outlines the transfer of the powers that were exercisable by the various Governors and Lieutenant Governors of the former colonies to the respective federal and provincial governors of Canada with Confederation. One concern of this section has been the vagueness of the prevision "by the Governor General with the Advice, or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Member thereof, or by the Governor General individually."[124] As J. R Mallory does note that "the powers of the Governor General, as set in the Constitution [especially Section twelve], are formidable, though vague...it is by no means clear where the line is between powers exercised on advice and on the responsibility of the government of the day and powers the Governor General may exercise on his or her discretion."[125] Barbara Messamore and David Smith echo this sentiment "David E. Smith has aptly remarked that the Act conceals more than it reveals. 'Concealment lies in the misrepresentation of who does what and in the silence about how and when they do it."[126]The awkward phrasing in Section 12 is to some extent repeated in the Letters Patent, 1947. Paul Lordon aptly sums up Section 13 and 14 of the *Constitution Act*, 1867, "Section 13 provides that any reference in the *Constitution Act* to the Governor General in Council is to be construed as referring to the Governor General acting by and with the advice of the Privy Council. Under section 14, the Queen may authorize to appoint deputies."[127]

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[123] Ibid. Section 11

[124] Ibid.

[125] Mallory, J.R. "The Continuing Evolution of Canadian Constitutionalism" from Cairns, Alan & Williams, Cynthia. Constitutionalism, Citizenship and Society in Canada. Royal Commission on the Economic Union and Development Prospects for Canada. Vol. 33. University of Toronto Press: Toronto, 1985. p. 63

[126] Barbara J Messamore. "'The Line which he must not pass': Defining the Office of Governor-General, 1878. " The Canadian Historical Review. Vol. 86, Number 3, September 2005. p. 454

The *Constitution Act, 1867* demonstrates that the Governor General is indispensable to the legislative branch. The Governor General appoints Senators to Canada's upper house as provided by Section 24 as well as the Speaker of the Senate under Section 34. The Governor General summons sessions of the House of Commons under Section 38 and dissolves Parliament under Section 50. Section 54 states that "any Vote, Resolution, Address or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost," must be first recommended by the Governor General beforehand. [128] Section 55 provides that a bill will only become law after it receives Royal Assent from the Governor General. This section also allows the Governor General three options whenever presented with a bill, the governor can provide assent to the bill making it law, refuse assent or reserve it for the pleasure of the monarch. Section 57 notes that, "A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until, within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council."[129]

The Governor General also plays an important role in the judiciary. The Governor General appoints the "Judges of the Superior District, and Country Courts in each Province," with the exception of probate courts in Nova Scotia and New Brunswick with Section 99.[130]Section 99 also provides that the superior court judges "shall be removable by the Governor General on address of the Senate and the House of Commons."[131]

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[127] Lordon, Paul. Crown Law. Butterworths: Toronto, 1991. p.16
[128] *Constitution Act*, 1867, Sec 54
[129]Ibid. Sec 57
[130]Ibid. Sec 99
[131]Ibid.

C. The *Constitution Act*, 1867 and the Lieutenant Governor

The *Constitution Act*, 1867 provides bodies similar to the Privy Council and the Governor General for the provinces in the Executive Council and the Lieutenant Governor. Lieutenant Governors are appointed by the Governor-General-in-Council using the Great Seal of Canada under Section 58. Section 59 demonstrates that the Lieutenant Governor serves at the pleasure of the Governor General, but a Lieutenant Governor cannot be dismissed without "cause assigned."[132] Section 90 provides that the some powers granted to the Governor General apply to the Lieutenant Governor also: "the provisions relating to the Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, shall extend and apply to the Legislatures…with the Substitution of the Lieutenant Governor of the Province for the Governor General."[133]

D. The *Letters Patent*, 1947

Many Constitutional conventions are alleged to have resulted from the Imperial Conferences of 1926 and 1930. However, the *Letters Patent*, 1947 did not confirm them.

The *Letters Patent,* 1947 are arguably the most important document with respect to the Governor General. Unlike the *Constitution Act*s they cannot be repealed by the Canadian Parliament, as such an undertaking requires the involvement of the Canadian Sovereign. The *Letters Patent*, 1947 continued the legal sanction of the Governor General as Commander-in-Chief as well as confirmed the use at his/her pleasure the Constitutional powers provided the Office by the *Constitution Acts* 1867 to 1946. A significant addition transferred all powers and authorities of the monarch with respect to Canada in Article II: "And We do hereby authorize and empower our Governor General, with advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all power authorities lawfully belonging to us in respect of Canada."[134]

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[132] Ibid.
[133] Ibid.
[134] *Letters Patent*, 1947, Art II

The general transfer of all powers and authorities could be judged to include all Royal Prerogatives. The significant transfer of the royal prerogative arguably elevates the Governor General from being a simple evolution of the colonial governors to a full-fledged viceroy. After the Imperial Conferences of 1926, 1929 and 1930 some had felt in light of the Imperial Conference of 1926 that the Governor General would be more appropriately deemed a viceroy. Lord Willingdon wrote to Lord Stamfordham on June 17, 1930 arguing this cause. Stamfordham responded on September 19 that "The King will not agree to your proposal to make all Governor General 'viceroys' though really that is a more appropriate term than ever."[135]

Notwithstanding this debate over title, the *Letters Patent*, 1947 clearly establish the Canadian Governor General as a viceroy. The scope and force of his powers warrants nothing less. This is significant as this establishes the immunity applicable with the legal status of *in loco Regis*. The differentiation between a viceroy and the Governor General was noted in *Musgrave v Pulido*, [1879] 5 AC 102 (Jamaica, J.C) where it was found that a viceroy was a position that had "the delegation of the whole of the royal power."[136] A Governor had his authority "derived from his commission, and limited to the powers thereby expressly or implicitly entrusted to him."[137] Peter J. T O'Hearn, Q.C argued in 1964 that the Governor General had the delegation of nearly the whole of the royal power, "Today the Governor General is in fact a viceroy…He exercises the powers, such as they are, of the Crown, and he exercises all of them, except the power to name his successor."[138] This assumption is confirmed in the modern literature (post 1947). Andrew Heard has noted, "Since the granting of the new *Letters Patent* in 1947, however, a good case could be made that the Governor General is now truly a viceroy and might claim the monarch's personal immunity from suit."[139] Noel Cox argues this point as well noting that the full transfer of powers has surpassed the threshold required for viceroy:

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[135] Mallory, J.R. "The Appointment of the Governor-General: Responsible Government, Autonomy, and the Royal Prerogative. " The Canadian Journal of Economics and Political Science, Vol. 26, No. 1 February 1960. p. 100

[136] Noonan, Peter. The Crown and Constitutional Law in Canada. Srpinoon Publications: Calgary, 1998. p. 113

[137] Ibid.

[138] O'Hearn, Peter J. T_Q.C Peace, Order and Good Government: A New Constitution for Canada. The Macmillan Company of Canada: Toronto, 1964. p. 100

[139] Heard, Andrew. Canadian Constitutional Conventions: The Marriage of Law and Politics. Oxford University Press: Toronto, 1991 P.40

> However, a Governor or Governor General, although representing the Sovereign, does not automatically have authority to exercise the royal prerogative, since he or she possesses only those powers conferred on him or her. In each case, the question must turn upon the constitution or statute law of the country concerned or the terms of the delegation by the Sovereign. A viceroy, in contrast, is *in loco Regis*, in which case there is a general delegation of the prerogative. Such appointments were rarely made.[140]

However, such an appointment has certainly been made with respect to not only the Canadian Governor General, but the Governor General of Australia and New Zealand as well. Cox continues noting that the Governor General "is almost as full a personification of the Crown as the Sovereign is. The Governor General has become a de facto viceroy, empowered to exercise a general delegation of the Royal Prerogatives, and entrusted by the Sovereign with complete responsibility for the government…"[141] Edward Schreyer, Canada's Governor General from 1979 to 1984, agrees with the sentiment that the Governor General would be more aptly viewed as a viceroy: "I don't think that's a stretch or exaggeration I think that's probably more accurate than to regard the Governor General's role today as no different today than say it was before 1932 or certainly before 1947."[142]

Article II of the *Letters Patent*, 1947 also contradicts the convention that the Governor General must act on the advice of the Cabinet. In a strict legal interpretation, the Governor General may take the advice of the Privy Council, not necessarily the cabinet or first minister. Depending on the situation, this may require a group of its members or a single individual. The cabinet after all "may be defined as a committee of Privy Councillors whose members have seats in Parliament," but it is not representative of the entire Privy Council.[143] It cannot be denied that the Governor General may consult a member of the Privy Council on matters of state, other than the currently elected councillors of the Privy Council. Since the membership of the Privy Council includes every former Prime Minister and most former cabinet minister as well as many former or current Parliamentary Secretaries, Leaders of the Opposition, Chief Justices of the Supreme Court, Premiers along with prominent Canadians and former Governors General this body represents one of great legal and political experience. One theoretical interpretation could have Edward Schreyer, a former Governor General or Brian Mulroney, a former Prime Minister, or Conrad Black, as privy councillors advising the current Governor General Michaëlle Jean on a course of action that may include the dissolution of Parliament or a ministry, or a refusal of Royal Assent. Another theory would require that the entire Privy Council could be called together to provide advice to the Governor General.

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[140] Cox, Noel. "The dichotomy of legal theory and political reality: with particular regard to the honours prerogative and imperial unity. " Australian Journal of Law and Society (1998-99) from http://www.iaphs.org/journal-1.html p. 5

[141] Ibid. p. 3

[142] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

[143] Matheson, W.A. The Prime Minister and the Cabinet. Methuen: Toronto, 1976. p. 7

Article III confers the powers of the Governor General for the custody of the Great Seal of Canada that is used on "all state documents such as proclamations and commissions of cabinet ministers, senators, judges and senior government officials."[144] Articles IV allows the Governor General to appoint on behalf of the monarch "all such judges, Commissioners, Justices of the Peace, and other necessary Officers (including diplomatic and consular officers) and Ministers of Canada."[145] Article V allows for the Governor General "to remove from his office, or to suspend from the exercise of the same, any person exercising any office within Canada."[146] The Governor General's ability to summon, prorogue or dissolve Parliament is stipulated in Article VI, reinforcing the said powers as spelled out in the B.N.A Act.

Article VII provides for the appointment of a deputy or deputies Governor General, to be made at the discretion of the Governor General. In a tenuous way members of the Supreme Court of Canada are arguably part of the Office of the Governor General, as they may and traditionally do serve as Deputies for the Governor General. The Deputy or Deputies Governor General can severally or jointly exercise the powers of

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[144] http://www.pch.gc.ca/progs/cpsc-ccsp/sc-cs/o8_e.cfm
[145] *Letters Patent*, 1947 Art III
[146] Ibid. Art V

Governor General as is deemed necessary or expedient. Traditionally, the Governor General of Canada has appointed the Chief Justice of the Supreme Court of Canada as the Deputy Governor General, which fulfills the succession requirement of Article VIII. The Chief Justice of the Supreme Court, as the Deputy Governor General, is able to give Royal Assent to legislation if the Governor General is indisposed and this has equivalent force to Royal Assent given by the Governor General.

Upon the death, incapacity, removal or absence of the Governor General, the Chief Justice of Canada will automatically assume all the powers of the Governor General as the administrator. In the event that the Chief Justice of the Supreme Court is incapacitated, the succession would continue to the next most senior judge of the Supreme Court who would become administrator. Should the entire Supreme Court of Canada be incapacitated the order of succession would continue to the most senior judge in Canada. Any administrator must first take the oaths of office for Governor General before exercising any powers or prerogatives. Article VIII also notes that should the Governor General be absent for Canada for a period more than a month that all powers and authorities would be transferred to the Chief Justice. The inclusion of the judiciary into the succession to the Governor General quite nicely dovetails Canada's highest legal authorities, which now play a considerable role in Canadian politics since the introduction of the *Charter of Rights and Freedoms*. It also establishes a notion that it would be acceptable for the Governor General to follow the advice of the Supreme Court of Canada even if it conflicts with the advice of a Prime Minister or a cabinet in the defense of the *Charter of Rights and Freedoms*.

Article IX clearly reinforces the Governor General in Canada as the supreme authority and Commander-in-Chief, noting that "We do hereby require and command all Our Officers and Ministers, Civil and Military, an all other inhabitants of Canada, to be obedient, aiding and assisting unto Our Governor General."[147]While convention establishes that the Governor General must obey the advice of the Prime Minister or Cabinet, law demands that the Prime Minister and cabinet obey the Governor General.

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[147] *Letters Patent*, 1947 Art IX

Written laws can be enforced, convention cannot. Article IX also establishes that were the military given contradictory orders from both the Prime Minister and the Governor General, the orders given by the Governor General would have to be obeyed.

Article X details how the Governor General is to take office. It requires that the Governor's General Commission be made under the Great Seal of Canada and read or published in the presence of the Chief Justice or another Judge from the Supreme Court of Canada. The Oath of Office that the Governor General must take is as follows, "I, ... do swear that I will be faithful and bear true allegiance to His Majesty King George the Sixth, His Heirs and successors, according to law. So Help me God."[148] While Article XI allows the Governor General to administer an oath to any who "hold any office or place of trust or profit in Canada."[149] Article XII confirms the prerogative power of granting pardons for any crime in Canada.[150] The Article makes specific mention of the ability of the Crown to grant a pardon to an accomplice in order to gain testimony. Article XIII allows the Governor General the power to grant Exequaturs, "an official recognition of a consul or commercial agent by the government of the country to which he is accredited, authorizing him to exercise his power."[151] Article XIV stipulates that a Governor General leaving Canada must first obtain the permission of the Prime Minister of Canada before doing so.[152] This ensures that the Governor General would be present to exercise her prerogative powers at the appropriate time. However, should the Prime Minister needlessly defer the wishes of the Governor General, the Prime Minister could be given a direct order that he would be compelled to obey. Articles XV allows the 1947 *Letters Patent* to be amended, revoked or altered at any time. This can only be done by the Canadian Sovereign as nowhere in this article does it note that that this will be automatically done on the request of the Prime Minister.[153] The *Letters Patent*, 1947 are interesting as they are a piece of legislation that was not issued by a Canadian government, but rather directly by the Sovereign. As such, it cannot by amended by a Canadian government.

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[148] Ibid. Art X

[149] Ibid. Art XI

[150] Ibid. Art XII

[151] Ibid. Art XIII

[152] Ibid. Art XIV

[153] Although, there is some precedent for this as such as the 1931 *Letters Patent* which were issued on the request of Prime Minister Mackenzie King.

The *Letters Patent* while enhancing the powers of the Governor General have diminished the powers of the Canadian monarch. Paul Lordon has noted that the "Queen cannot, however, exercise a power or function specifically assigned by the constitution or by statute to the Governor General as *persona designata*."[154] In order for the Queen to regain the powers she has divested to the Governor General, she must issue new *Letters Patent* and revoke the previous Letter Patent. In the new *Letters Patent* Her Majesty must indicate that she desires to usurp the powers of the Governor General with respect to the prerogative powers. However, it must be noted that Queen possesses prerogative powers to intervene and even overrule the Governor General should the circumstances dictate.

E. Others *Letters Patent* 1931, 1952, 1977 & 1988

The *Letters Patent*, 1931 was revoked by the issuance of the *Letters Patent*, 1947. However, it would be helpful briefly to consider the instructions given to the Governor General of Canada in the immediate aftermath of the Byng-King dispute and the Imperial Conferences of 1926, 1929 and 1930, which all discussed the role of the Governor General. The examination of the *Letters Patent*, 1931 illustrates that the conventions established in the Imperial Conferences were not codified in the new instructions. Two provisions of 1931 that would be copied nearly verbatim in the subsequent *Letters Patent*, 1947, were Article IV (which became V in 1947) and VIII (which became IX in 1947). These articles flew in the face of what many would argue had been achieved because of the Byng-King dispute. Article IV was the suspension and removal from office provision: "And We do further authorize and empower Our said Governor General, so far as We lawfully may, upon sufficient cause to him appearing, to remove from office within Our said Dominion, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us in Our name or under Our authority."[155]This provision almost seems an explicit repudiation of the belief and even the 'convention' established at the Imperial Conferences that the Governor General would follow the advice of the first minister. This was a clear statement that the Governor General would not necessarily have to follow the advice of the First Minister as he could dismiss him with 'sufficient cause', a very ambiguous nomenclature. Article VIII noted that all "Our Offices and Ministers, Civil and Military, and all other the inhabitants of Our said Dominion to be obedient, aiding, and assisting unto Our said Governor General..."[156]Perhaps this provision could be seen as to prevent a Prime Minister, like Mackenzie King in 1926, from campaigning against a Governor General for political purposes, as this would be consistent with not aiding, assisting or being obedient to the Governor General.

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[154] Lordon, Paul. Crown Law. Butterworths: Toronto, 1991. P.16
[155] *Letters Patent*, 1931

The issuance of the 1952 *Letters Patent* did not radically change the Office of the Governor General. What it did do was provide the ability of a Governor General to resign, an option not afforded under the Letter Patent, 1947. As noted by J.R Mallory, the 1947 *Letters Patent*, "...failed to specifically provide for the possibility of voluntary resignation prior to the end of term. Accordingly, new *Letters Patent* were issued in 1952 to enable Lord Alexander to resign office before the term of his commission had expired."[157]

While the *Letters Patent*, 1947 had conveyed considerable power unto the Governor General of Canada, there were still some missing aspects. As Vincent Massey would describe in his memoirs,

> There is an important sentence in these *Letters Patent*: "There will be no legal necessity to alter existing practices." The permission thus implied has led to the continuation of the custom by which the letters of credence of Canadian diplomatic representation are still signed by the Sovereign and not by the Governor General. Similarly, letters of credence and recall presented by diplomatic representatives accredited to Canada are addressed not to the Governor General but to the Sovereign.[158]

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[156] Ibid.
[157] Mallory, J.R. The Structure of Canadian Government. rev ed. Toronto: Gage Publications, 1984 p. 46
[158] Massey, Vincent. What's Past is Prologue. The Macmillan Company: Toronto, 1963. p. 469

However, in the 1970's this process became untenable for Pierre Trudeau. Trudeau would approach the Queen in 1972 about transferring the external affairs functions to the Governor General to "lighten the paperwork load of Her Majesty."[159] Trudeau was careful to politely suggest rather demand that this should be done, but nonetheless he was advising the Queen. Her Majesty agreed in principle to four of his suggestions such as the "appointment of foreign ambassadors, the recall of Canadian envoys, and the establishing or severing of diplomatic relations."[160] However, Her Majesty would refuse another of Trudeau's requests as Peter Stursberg would note, "she demurred on the fifth proposal, which would have her hand over to the Governor General the signing of the letters of credence for Canadian diplomats. As a result, the whole matter was dropped, and a spokesperson for Trudeau said, "Nothing has changed."[161] The Queen's chief objection was that such a move would create confusion of who was in fact Canada's head of state: the Governor General or the Queen. It took the Prime Minister nearly five years before the Queen would eventually consent to Trudeau's advice. The issue of new *Letters Patent* in 1977 would fulfill Trudeau's earlier request of the four proposals, but not the fifth. The fifth proposal, the signing of the letters credence by the Governor General would not be approved by Her Majesty until December 2004. Now, it is worth noting that Her Majesty had refused the advice of her first Minister Pierre Trudeau in breach of 'convention.' Clearly, there are issues on which a first minister cannot force acquiescence of the Crown.

Another missing aspect of the *Letters Patent*, 1947 was a purely Canadian institution that would allow for the granting of arms as well as the promotion of heraldry. However, this was achieved on June 4, 1988 when Prince Edward presented Governor General Jeanne Sauvé with new *Letters Patent*, which allowed for ""the Governor General of Canada to exercise or provide for the exercise of all powers and authorities lawfully belonging to Us as Queen of Canada in respect of the granting of armorial bearings in Canada"[162]It worth noting that Rideau Hall is in close contact with their colleagues in the United Kingdom on heraldic and armorial matters.

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[159] Stursberg, Peter. Roland Michener: The Last Viceroy. McCraw-Hill Ryerson: Toronto, 1989. p. 216
[160] Ibid.
[161] Ibid.

F. The Westminster System (Checks and Balances: the Crown as a check on the Prime Minister and the House of Commons)

Canada joined Confederation with the understanding that it would have a Westminster-style government. The Westminster system contained a series of checks and balances to ensure that the system of government would not degrade into tyranny. Three of the six systems of government from Aristotelian method of classification presented in Politic; kingship, aristocracy and democracy are represented in the Westminster system. In the Westminster system kingship is represented by the monarch, aristocracy, or an educated elite, by an Upper House, like the House of Lords, and the will of the people represented through the commons by a lower house. Each component in the Westminster model checks the other to ensure that neither becomes too dominant. This is essential as a monarch can become a tyrant, the educated elite can become an oligarchy and the democratic will of the people can be become the will of the mob.

The Westminster tradition has not been upheld in Canada. This has been part of a lack of perceived legitimacy of the unelected checks and balances of the Parliamentary body. However, in *New Brunswick Broadcasting Co. v. Nova Scotia (Donahoe) Speaker of the House of Assembly* in 1993, Madame Justice McLachlin delivered the majority decision of the Supreme Court of Canada by citing the importance of the 'Westminster principles' of acting properly,

> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is

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[162] http://www.gg.ca/heraldry/cha/index_e.asp?printVersion=true

> equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.[163]

J.R Mallory argues that, "Checks and balances existed in our system's early days but have eroded or have lost their persuasiveness in the face of modern democratic values. The result is that the very concept of checks and balances as embedded in the original Westminster model has all but disappeared from the popular understanding of the process of government."[164]Lowell Murray argues that, "Indeed, if truth be known, of the three components of Parliament-Crown, Senate and Commons-only the Senate is performing as is it should," though he would admit that the Senate is not as sober as it could be.[165] In Canada, informal checks and balances have replaced the formal ones. The informal checks and balances such as the fifth estate are not up to the task in an era of media convergence. In any event, private bodies cannot adequately replace public checks and balances.

The lack of formal checks and balances has contributed to the democratic deficit in Canada. A frequent criticism of contemporary politics has been the concentration of power in the Office of the Prime Minister and Premier along with the Cabinet. W.A Matheson correlates this at least in part to "the lack of influence of the Governor General,"[166] This argument holds true to the Lieutenant Governors also. The democratic deficit is not unique to Canada, as it has become widespread among states that use the Westminster model. In 1951, Lord Radcliffe noted that the executive and legislative have in effect merged: "The executive and lawmaking power are to all intents and purposes the same, because both powers have fallen into the same hands, those of the ruling political party."[167]Lord Scarman would reciprocate and amplify these concerns nearly 30 years later "We have achieved the total union of executive and legislative power which Blackstone foresaw would be productive of tyranny . . . the judges will maintain the rule of law, but cannot prevent government from changing the law, whatever the nature of the change."[168]

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[163] New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly); 1993 Carswell NS 417; [1993] 1 S.C.R. 319, 146 N.R. 161, 100 D.L.R. (4th) 212, 118 N.S.R. (2d) 181, 327 A.P.R. 181, 13 C.R.R. (2d) 1; Supreme Court of Canada; January 21, 1993

[164] Mallory, J.R. "The Continuing Evolution of Canadian Constitutionalism" from Cairns, Alan & Williams, Cynthia. Constitutionalism, Citizenship and Society in Canada. Royal Commission on the Economic Union and Development Prospects for Canada. Vol. 33. University of Toronto Press: Toronto, 1985. p.51

[165] Murray, Lowell. "Which Criticisms are Founded" From Joyal, Serge (ed.) Protecting Canadian Democracy: The Senate You Never Knew. McGill-Queen's University Press: Montreal, 2003. p. 135

[166] Matheson, W.A. The Prime Minister and the Cabinet. Methuen: Toronto, 1976. p.79

Some scholars argue that this concentration of power in the office of first ministers merely makes the vice-regal offices more relevant to contemporary Canada as Edward Schreyer notes,

> There's first of all, I agree with your reference that our Parliamentary system has sort of evolved towards one in which the Office of the Prime Minister has become almost Presidential and because [since it has] become Presidential, the influence of cabinet colleagues has diminished and at the same time the influence of the government caucus on cabinet on Prime Minister or first minister has diminished. …All the more reason for why the Office of the Governor General or the Lieutenant Governor retains at least as much relevance if not more than thirty, forty, fifty years ago or more.[169]

Critics of any vice-regal interventionism would note that the role in Canada should be devoid of any real political interaction. Critics claim that these unelected positions lack legitimacy in a democratic society. This assertion can be critiqued. Firstly, Canada is a Constitutional Monarchy rather than simply democracy. Vice-regals have the right to intervene as provided by the constitution. In the Canadian political system, there are numerous vital and unelected positions. They provide a valuable contribution to the Canadian political ideal. Some examples include the Auditor General, the Chief of the Defence Staff, the Clerk of the Privy Council and the Prime Minister's Chief of State, not to mention the entire judiciary in Canada. The considerable powers of those offices are at worst tolerated and at best celebrated. Additionally, there is poll data to suggest that there is some democratic legitimacy for vice-regals to intervene. A CTV and Globe and

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[167] Corbtett, Stan. "Ministerial Responsibility and the *Financial Administration Act*: The Constitutional Obligation to Account for Government Spending. " From Gomery Report Volume 3: Linkages: Responsibilities and Accountabilities.
http://www.gomery.ca/en/phase2report/volume3/CISPAA_Vol3_5.pdf p. 135
[168] Ibid.
[169] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

Mail poll conducted between September 21st and 25th, 2005 asked several questions on the role of the Governor General. One of which was: "When you think of the Governor General of Canada, do you regard this position as very important, somewhat important, not very important, or not at all important to Canada?"[170] The response was such that the 23% of respondents felt that Canada that the Office of Governor General was very important to Canada, while 34 percent of respondents thought the role of the Governor General was somewhat important.[171] Some 20 percent of respondents thought the Office of the Governor General was not very important and 19 percent of respondents thought it was not at all important.[172]

G. Preliminary Conclusions

Chapter III clearly demonstrates that the powers of intervention for Canada's vice-regals are not theoretical. The *Constitution Act*, 1867 explicitly gives almost exhaustive powers to the Governor General and Lieutenant Governors. That most government actions in Canada require the authority of the Crown and the *Constitution Act,* 1867 is a good indication of this. The description provided by Jacques Monet of the powers of the Governor General may shock many. Even though it is not very likely that all these powers would be implemented they still exist and they fall within the ability of the office. It is interesting to note that in this fundamental Constitutional document there is no mention of a Prime Minister or a Premier, indicating that the intention of the Fathers of Confederation and the Imperial Government was to ensure the supremacy of the Crown.

Subsequent documents confirmed and even solidified the vice-regal offices. The *Letters Patent,* 1947 transferred nearly all of the Royal Prerogatives of the Canadian sovereign to the Governor General, and effectively promoted this position from a Governor General to a viceroy. With this new status, the Governor General gained the personal immunities and Royal Prerogatives of the Crown. In addition, there were some powerful elements provided by the *Letters Patent*, 1947, such as Article V, which allows the Governor General to dismiss any officeholder in Canada, including the Prime Minister. The *Letters Patent*, 1931 & 1947, came after the Byng-King dispute, and yet the Imperial government did not limit the powers of the Governor General nor did it confirm Mackenzie King's perception of the office.

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[170] The Strategic Counsel. A Report to the Globe and Mail and CTV: Perceptions Toward Governor General. September 25, 2005. www.thestrategiccounsel.com
[171] Ibid.
[172] Ibid.

The need for the Westminster system of checks and balances is another legal basis for the continued relevance of the vice-regal offices. Canada came into Confederation with the understanding that it would be a Westminster system. However, the Westminster model has been not been fully followed. It is not a coincidence that a democratic deficit, particularly the concentration of power in the office of the first minister, has resulted while the following of proper Westminster structure has decreased. The democratic deficit would be partially solved if only the Westminster model, including the vice-regals acting as a check on the first ministers, were more closely followed.

Chapter IV. Constitutional Conventions

A The nature of conventions

To understand fully the role of the Lieutenant Governor and Governor General in Canada, one must examine the nature of Constitutional conventions. The need to examine conventions is clear in that they restrict the powers of the Governor General and the Lieutenant Governor. However, an introduction of conventions is required.

The Supreme Court of Canada described the nature of conventions in *Reference Re Amendment of the Constitution of Canada* on September 28, 1981 as, "…essential rules of the Constitution are called conventions of the Constitution. They are the principles and rules of responsible government, which were developed in Great Britain by way of custom and precedent during the nineteenth century and were exported to such British colonies as were granted self-government."[173]The Supreme Court continued in its description of conventions noting, "The main purpose of Constitutional conventions is to ensure that the legal framework of the Constitution will be operated in accordance with the prevailing Constitutional values or principles of the period. Being based on custom and precedent, Constitutional conventions are usually unwritten rules."[174] Political theorists have argued similarly. Robert and Doreen Jackson note that conventions fill in gaps of the written Constitution, "Even vital procedural matters bearing on the governing of the country go unmentioned in the *BNA Act*; for example, the executive roles of the prime minister and cabinet are not mentioned specifically. Such Constitutional rules that are accepted practice or tradition without being enshrined in the written constitution are called conventions."[175] Craig Forcese and Aaron Freeman have defined convention as "Constitutionalized practices based on precedents established by the political institutions of governments themselves, not court jurisprudence, and which are not enforced by the courts."[176]This definition submits that other political institutions cannot bind other institutions.

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[173] *Reference RE Amendment of the Constitution of Canada*. (Nos. 1, 2 and 3) (Part 1 of 2)3d series 125 D.L.R. (3d) 1125 D.L.R. (3d) p. 4

[174] Ibid.

[175] Jackson, Robert J. and Jackson, Doreen. Politics in Canada: Culture, Institutions, Behaviour and Public Policy. 5th Edition. Prentice Hall: Toronto, 2001.p. 152

Geoffrey Marshall has identified some conventions and the "slipperiness" associated with them,

> 1. The prerogatives of the Crown are exercised on the advice of Ministers (except in cases as they are not). 2. The Government resigns when it loses the confidence of the House of Commons (except when it remains in office) 3. Ministers speak and vote together (except when they cannot agree to do so). 4. Ministers explain their policy and provide information to the House (except when the keep it to themselves). 5. Ministers offer their individual resignations if serious errors are made in their Departments (except when they retain their posts or are given peerages. 6. Every act of a civil servant, is legally speaking, the act of a Minister (except those that are, legally speaking, his own.).[177]

While this notation is specific to the British context, it is equally applicable to the Canadian context.

B. Brief Review of Heard's Classification

Andrew Heard has argued that conventions are hierarchical. Within this hierarchy, Heard has classified four groups: fundamental conventions, meso-conventions, semi-conventions and infra-conventions. Fundamental conventions are those that "...buttress vital Constitutional principles and are supported by general agreement on the existence and value of the principle involved, as well as on the terms of the rule itself."[178]Fundamental conventions, according to Heard, must be "continuously respected."[179]Meso-conventions are similar to fundamental conventions but their "specific terms may be altered without any drastic change to the practical operation of the constitution."[180]Semi-conventions are those in which, "the constitution is not significantly affected by their absence of breach." Rounding out the group are infra-conventions, which are "supposed by some actors and authorities to be convention, but in fact cannot really be viewed objectively as binding rules since they lack sufficient consensual agreement on their existence."[181] Another element that may be included is that of custom, a traditional activity that has largely no Constitutional relevance. One example of this is the dragging of the Speaker to the Chair after his or her election in the House. This is done simply out of tradition, and if this tradition is not performed after the election of a Speaker there would be little consequence as a result.

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[176]Forcese, Craig & Freeman, Aaron. The Laws of Government: The Legal Foundations of Canadian Democracy. Irwin Law: Toronto, 2005. p. 646

[177] Marshall, Geoffrey. Constitutional Conventions: The Rules and Forms of Political Accountability. Clarendon Press: Oxford, 1984. p. 54

[178] Heard, Andrew. The Canadian Constitutional Conventions: The Marriage of Law and Politics. Toronto: Oxford Press, 1991. p. 145

[179] Ibid.

[180] Ibid.

C. Opinions of the role of Governor General and Lieutenant Governor by Constitutional Scholars: The Limits presented by Convention

There is a lack of consensus on a host of Canadian Constitutional issues. There is an adage in Canadian political science that the consultation of three Constitutional scholars on their Constitutional opinions will discern four different points of view. The debate over the Governor General and Lieutenant Governors is no different. It may be helpful for the purpose of this thesis to outline the divergent political opinions, and contrast them with precedents and actual practice. This will serve as a threshold test. If the precedents are sufficient in illustrating and confirming the thesis, this will establish the validity of one school of thought and a solid basis to proliferate the argument. With respect to Constitutional law, this test does not invalidate alternative interpretations.

Many scholars argue that Constitutional conventions are a major limitation on the Governor General and Lieutenant Governor's lawful power. As noted by Hogg, "In a system of 'responsible government' (or cabinet or Parliamentary government, as it may be called) the formal head of state, whether King (or Queen), Governor General or Lieutenant Governor, must always act under the "advice" (meaning direction) of ministers who are members of the legislative branch.[182] Adam Dodek confirms this sentiment, "The most basic principle of responsible government in Canada is that the Governor General must always act under the "advice" (i.e. direction) of ministers who are members of the Parliament and who enjoy the support of a majority of members of the House of Commons (MPs)."[183] Andrew Heard has argued, "Indeed, it is only because of these conventional restraints that the broad legal powers of this monarchical office are tolerated within Canada's democratic constitution."[184]

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[181] Ibid.

[182] Hogg, Peter. Constitutional Law of Canada 3rd Edition. Toronto: Carswell, 1992. p. 18

In the literature, most intone that the conventions that bind Canada's vice-regals originated not from the establishment of responsible government in 1848 or even post-Confederation. There is plenty of evidence in these periods of intervention by both Governor General and Lieutenant Governors. These conventions originated in the immediate aftermath of the Byng-King dispute. J.R Mallory notes of the Governor General, "In general he is bound to act on his [minister's] advice and practically every act if the government requires ministerial responsibility. This position was affirmed by the Imperial Conference of 1926."[185] Adam Dodek has argued, "Conventional wisdom maintains that the 1926 Byng-King affair, which saw the Governor General refuse the Prime Minister's request for a dissolution of Parliament, establishes the convention that the Governor General cannot refuse to act on the advice of the Prime Minister."[186] Earl H. Fry confirms this sentiment: "...elections were eventually held with the issue of the Governor General's powers being of paramount importance. King's party won the election, clearly underlining the point that the Governor General was not to exercise significant discretionary powers."[187] Paul Henderson has provided an Australian context: "...events occurred before the historic Imperial Conference of 1926 at which it was agreed that the Governor General should listen to his Australian ministers."[188] However, Edward McWhinney has made a more accurate statement: "...the convention developing from the 1926 King-Byng conflict-that the Governor General must yield to the 'advice' of the prime minister of the day-but in fact this position has always been challenged by Eugene Forsey from 1926 onwards."[189]

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[183] Heard, Andrew. The Canadian Constitutional Conventions: The Marriage of Law and Politics. Toronto: Oxford Press, 1991. p. 18

[184] Ibid.

[185] Mallory, J.R. The Structure of Canadian Government. Revised Edition. Gage Publishing: Toronto, 1984. p. 45

[186] Dodek, Adam. "Rediscovering the Constitutional Law: Succession Upon the Death of the Prime Minister" University of New Brunswick Law Journal 2000. p. 39

[187] Fry, Earl H. Canadian Government and Politics in Comparative Perspective. University Press of America: New York, 1984. p. 32

[188] Henderson, Paul. Parliament and Politics in Australia: Political Institutions and Foreign Relations 4th Edition. Heinemann Educational Australia: Richmond, 1987. p. 87

With respect to Heard's classification of conventions, there are aspects of the offices of the Governor General and Lieutenant Governors that fall within each category. For instance, a fundamental convention in Canada is that "governors must act on any Constitutional correct advice offered by their ministers."[190] Heard makes an interesting distinction not often repeated, that the advice tendered must be constitutionally correct. This includes not only the written constitution, but convention as well. Heard lists another fundamental convention with respect to governors who "may exercise their prerogative powers if an elected minister can be found to accept responsibility."[191] This argument does not properly distinguish the execution of the reserve prerogatives, which are by definition performed without ministerial advice. A vice-regal meso-convention is with respect to the alternation in the appointment of a governor. Such appointments are performed on the advice of the Prime Minister could be altered to follow the advice of the cabinet or the House of Commons as a whole.[192] A vice-regal infra-convention was found by Heard to be the "governor's ability to force an election…there is a great division about the principle that the governors might act as general guardians of the constitution."[193]

An additional group of conventions may be identified. These should be termed supra-conventions. Included, in this group of supra-conventions should be the Royal Prerogatives. Royal prerogatives, especially the reserve powers of the monarch and the Governor General, are superior conventions, needed to protect a higher legal or Constitutional order. As such, their use might break lower forms of conventions in order to ensure the stability and vitality of the Canadian Constitution and Confederation. Royal prerogatives are superior to other conventions by virtue of some legal immunity, which ensures they are very rarely subject to judicial review. Royal prerogatives may not be altered through the adoption of other Constitutional practice or by virtue of disuse. Changes in the Royal Prerogatives must be explicit requiring legislation that quite clearly and specifically replaces the prerogative with another legal method. Removal of Royal Prerogatives is not valid unless this action occurs. The weight of Royal Prerogatives is more significant in that they represent the highest legal order in the Westminster system: the Crown.

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[189] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005. p. 98

[190] Heard, Andrew. The Canadian Constitutional Conventions: The Marriage of Law and Politics. Toronto: Oxford Press, 1991. p. 145

[191] Ibid.

[192] Ibid. p. 146

[193] Ibid.

Some Constitutional theorists, such as Dodek, Hogg and Heard, have argued that the conventions regarding governors are the most binding and fundamental of all Canadian conventions. However, conventions, although important in the normal course of politics, are not as binding as some theorists would claim. They are certainly not binding enough to force a vice-regal to perform an act contrary to his or her Constitutional duty of ensuring the political stability and safety of Canada. A Governor General or Lieutenant Governor is not obligated to follow the advice of any government in power. Rather vice-regals are obliged only to follow the advice of a legitimate government and one that acts responsibly. The invoking of common sense will indicate that such a convention should not be blindly followed.

For instance, a Prime Minister could request that the Governor General issue a declaration of war against North Korea and order Canadian troops into that country as part of a unilateral invasion force. However, if the Prime Minister had not brought this matter before Parliament, the Governor General would be obliged to refuse this request. Canadian law does not require the Prime Minister to obtain the consent of Parliament in order to request a declaration of war, quite the contrary. However, such a request would be indicative of government acting irresponsibly. It would be also indicative that the Prime Minister wanted to circumvent debate on the invasion and did not have popular support for it. A first minister must not only have the confidence of the House, but of the vice-regal official as well. Similarly, if a government wished to gain Royal Assent for the equivalent of the Nuremburg legislation (implemented by Nazi Germany in 1933 to persecute people of Jewish faith) a Lieutenant Governor or Governor General would be quite right not to give assent. It would be foolish to give Royal Assent and expect the Supreme Court or another court to strike it down.

D. Relevant Actors must feel bound by convention

The extent to which conventions limit vice-regal power is dependent on the degree to which Lieutenant Governors or Governors General feels bound by it. If the relevant actor does not feel bound by a specific convention then quite simply the convention is largely not a convention. Andrew Heard has noted, "The conventional rules that are generally accepted in principle are those the relevant actors have clearly agreed exist. Perhaps tacit agreement or understanding may be the necessary element a practice acquires while it is gaining credence as an obligatory rule; once explicit acceptance is expressed, there can be little doubt that the convention is firmly established."[194]O. Hood Phillips has noted similarly in his definition of conventions, "rules of political practice which are regarded as binding by those to whom they apply."[195] Jennings has also noted that validity of conventions can be determined with a simple question, "Did the actors believe they were bound by a rule?"[196]Edward Schreyer notes that convention should be in normal circumstances followed. However, there may be circumstances where a Governor General should not feel bound by this convention, especially if it means preventing the Governor General from acting if some other political actor has breached a major convention. In other words, the Governor General and the Lieutenant Governor serve as an adjudicator of convention:

> Convention I mean up to a point has to do with the resoluteness of the Governor General. If the Governor General feels that something is being done that is not in keeping with the spirit of the constitution he should be he should feel free to act on it. However, not to be a fool either, I mean the Governor General above all else should be looking for stability in his country and his government and for the most part that means acting on the advice of the first minister of the government of the day.[197]

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[194] Heard, Andrew. The Canadian Constitutional Conventions: The Marriage of Law and Politics. Toronto: Oxford Press, 1991. p. 11

[195] Marshall, Geoffrey. Constitutional Conventions: The Rules and Forms of Political Accountability. Clarendon Press: Oxford, 1984. p. 11

[196] Ibid.

[197] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

In other words, a governor may abide by convention in normal circumstances and in the event intervention is required to opt out of the convention, as such adherence would be too constrictive to the protection of a higher legal order.

Now, it would be helpful to submit a more accurate convention that is more applicable to vice-regals as well as Canadian law and tradition. As Edward Schreyer noted of the vice-regal offices, "The office, the authority of the office, should not be invoked in such a way to thwart or frustrate the democratic will including the will of the democratically elected government."[198] That is the concept of responsible government and has been a concept of Canada in practice largely since 1848. Therefore, the conventions that bind the governor are those that came about with responsible government not with the Byng-King dispute.

E. Imperial Conferences and Conventions

Neither the Imperial Conference of 1926 nor the subsequent conference of 1930 outlined any of what the many theorists argue: strong conventions that limit the power of the vice-regals. There is also some debate as to the legal effect of the conventions formed at the Imperial Conferences. As Sir Lyman P. Duff, the Chief Justice of the Supreme Court noted in *Canada (Attorney General) v. Ontario (Attorney General)*; 32; [1936] S.C.R. 461: "With reference to the Report of the Conference of 1926 [and 1930]… it is said that since an Imperial Conference possesses no legislative power, its declarations do not operate to affect changes in the law."[199] Whatever was resolved at the Imperial Conferences was simply convention and like all conventions, they can be broken.

At the Imperial Conferences of 1926, 1929 and 1930 several clear conventions were established. At the 1926 Imperial Conference, the Dominions were concerned at the perceived political intervention of the Imperial government into Dominion affairs because of the Byng-King dispute. The Imperial government issued the Balfour declaration that regarded the Dominions, at least those that were self-governing, as "autonomous Communities within the British Empire equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs."[200] However, as K.C Wheare has noted "It has never been certain what this declaration meant. It had all the advantages of flexibility and ambiguity, and all the disadvantages."[201] This flexibility and ambiguity was common to these Imperial Conferences. This ambiguity was included in the discussions on the role of the Governor General as "the problem of the status of the Governor General and of the inequalities alleged to result from that status, on the other hand, were dealt with by the Conference of 1926 and 1930 solely by the adoption of Constitutional conventions."[202]

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[198] Ibid.

[199] Canada (Attorney General) v. Ontario (Attorney General); 32; [1936] S.C.R. 461, [1936] 3 D.L.R. 673; (at pp. 678-80 D.L.R., pp. 476-8 S.C.R.)

The 1926 Balfour declaration also provided a clear change and convention in the appointment of the Governor General,

> …it is an essential consequence of the equality of status existing among members of the British Commonwealth of Nations that the Governor General of a Dominion is a representative of the Crown, holding in all the essential respects, the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain and that he is not the representative or agent of His Majesty's government in Great Britain or any department of that Government.[203]

As noted by K.C Wheare this declaration meant that,

> Thus, the Governor General must act in accordance with the same rules as the King recognizes in his relation with his ministers. No attempt was made to indicate what these rules were. The problems of discretion still remained unsolved.[204]

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[200] http://www.thecommonwealth.org/Internal/34493/history/

[201] Wheare, K.C. The Statute of Westminster and Dominion Status 5th Edition. Oxford University Press: London, 1952. p. 28

[202] Ibid.

[203] Imperial Conference, 1926 Summary of Proceedings. His Majesty's Stationary Office. p. 24

[204] Wheare, K.C. The Statute of Westminster and Dominion Status 5th Edition. Oxford University Press: London, 1952. p. 126

As Norman Ward has written this did not represent a change in any policy, as "this had, in fact been the view taken by Lord Byng and Arthur Meighen throughout the Canadian Crisis of 1926."[205]

At Imperial Conference of 1929, the conference decided that reservation at the federal level, where the Governor General could reserve legislation for Her Majesty on the advice of British ministers was to be no longer be practiced,

> The Report stated that the power of reservation, if existed at all, could only be exercised in accordance with the Constitutional practice in the Dominion governing the exercise on the powers of the Governor General; that the Imperial Government would in future not advise the King to give the Governor General instructions to reserve Bills; that it would not be in accordance with Constitutional practice as regards Bills reserved, either by discretion or compulsion, even where alterations to the constitution itself, requiring reservation, were affected, for the Imperial Government to offer advice to the King against the views of the Government of the Dominion concerned. [206]

However, the question of whether a Governor General could unilaterally and without Imperial advice reserve legislation for the Majesty's pleasure was not adequately rectified.

At the 1930 Imperial Conference, there was a resolution to alter the appointment of the Governor General. The Canadian monarch would hereafter be required to follow the advice of his Canadian ministers in the appointment of Governors General, rather than his British ministers. As noted in the report of the 1930 Imperial Conference Proceedings, "the Conference came to conclusion that the following statements in regard thereto would seem to flow naturally from the new position of the Governor General as representative of His Majesty only,"[207]

> 1. The parties interested in the appointment of a Governor General of a Dominion are His Majesty the King, whose representative he is, and the Dominion concerned. 2. The Constitutional practice that His Majesty acts on the advice of

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[205] Ward, Norman. Dawson's The Government of Canada 6th Edition. University of Toronto Press: Toronto, 1986. p. 176

[206] Neuendorff, Gwen. Studies in the Evolution of Dominion Status. George Allen & Unwin Ltd.: London, 1942. p. 232

[207] Imperial Conference, 1930 Summary of Proceedings. His Majesty's Stationary Office. p. 27

> responsible Ministers applies also in this instance. 3. The Ministers who tender and are responsible for such advice are His Majesty's Ministers in the Dominion concerned. 4. The Ministers concerned tender their formal advice after informal consultation with his Majesty.[208]

However, the appointment of the Governor General would not be clear-cut after the Imperial Conference of 1930. His Majesty would still play an important role in the appointment of the Governor General, as outlined by Article 4, of the appoint regulations Canadian ministers would still have to ensure that His Majesty approved of their choice. As described by J.R Mallory, "at this point the Imperial Conference took cognizance of the dispute…but also resolved that formal submission should be preceded by informal consultation to protect the King's right to resist an appointment he found to be undesirable."[209]

The appointment of the Governor General on the advice of his Dominion ministers rather than his British ones did create a problem. A change of government in Canada or Australia could result in a request ~~for a new~~ Governor General.[210] J.R Mallory uncovered a near Constitutional Crisis, again involving Mackenzie King in 1934-35. During this time, the Governor General of Canada, Lord Bessborough, intimated his desire to end his post sometime in the summer of 1935. As Mallory has described, "a change of government was likely to take place at the same time as the appointment of a new Governor General."[211] Mackenzie King was at the time the Leader of the Opposition, but he expected to defeat Prime Minister Bennett in those forthcoming elections. King indicated to Lord Bessborough that, "he would publicly refuse to associate himself with the appointment of a new Governor General prior to the election."[212] Mackenzie King had thought that Bennett had lost his mandate and did not have a right to give advice on the new appointment. Canada's King, George V, thought this an arrogant approach. For Bennett still possessed a majority and the confidence of the House of Commons. On January 3, it became clear that Bennett would be amenable to decide on a Governor General in concert with Mackenzie King. The crisis was not resolved until February 21, 1935 when King and Bennett mutually agreed to recommend John Buchan be appointed as the next Governor General. This averted a major Constitutional Crisis, as Mallory describes, "There was immense relief in Buckingham Palace at this news, for it removed the possibility that the King might feel impelled to reject Mackenzie King's advice to remove a Governor General."[213]The whole incident demonstrates how needlessly Mackenzie King attempted to provoke another conflict over the Governor General. The incident perhaps further de-legitimizes his entire role in the Byng-King affair some nine years earlier. It also establishes that King would have loved to win another election by citing yet another instance of foreign interference by the Imperial Government.

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[208] Ibid.

[209] Mallory, J.R. "The Appointment of the Governor-General: Responsible Government, Autonomy, and the Royal Prerogative. " The Canadian Journal of Economics and Political Science, Vol. 26, No. 1 February 1960. p. 93

[210] Ibid.

[211] Ibid.

[212] Ibid.

Some conventions from the Imperial Conference of 1926 and 1930 were broken just prior the patriation of the Constitution in 1982. The Imperial, or British Government, offered Her Majesty advice on the Canadian Constitution in this time. Perhaps some of this advice was contrary to Canadian interests, as patriation required negotiation between the two governments and did this not occur as quickly as one would hope considering all the conventions established during the Imperial Conferences. These conventions established that the monarch of Canada would only act with respect to Canadian interests by Canadian ministers. If this important convention can be broken, so can the conventions surrounding the Governors General.

F. Conventions not Enforceable by the Courts

Another reason why conventions are limited is rooted in the fact they are unjusticiable. This means that conventions cannot be resolved in a court of law. Geoffrey Marshall and Graeme Moodie note the lack of justiciability for conventions, "By conventions of the constitution, we mean biding rules of Constitutional behaviour which are considered to be binding [parts of] the Constitution, but which are not enforced by the law courts."[214]Peter Hogg has held a similar opinion on the justiciability of conventions, adding the element that should a Governor General or Lieutenant Governor break convention there is little that can be done by the courts or any actor to rectify this breach with convention,

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[213] Ibid. p. 104

> …like all conventions, they are not enforceable in the courts. If the Governor General exercised one of his powers without (or in violation of) ministerial advice, the courts would not deny validity to his act. If the Governor General withheld his assent to a bill enacted by both Houses of Parliament, the courts would deny the force of law to the bill, and they would not [nor could they as they do not have the requisite authority to compel a Governor General to] issue an injunction or other legal remedy to force the Governor General to give his assent.[215]

The Supreme Court of Canada in *Reference Re: Amendment of the Constitution of Canada* (Nos. 1, 2 and 3) (1981), 125 D.L.R. (3d) would state the reason why the courts cannot enforce conventions,

> Perhaps the main reason why conventional rules cannot be enforced by the Courts is that they are generally in conflict with the legal rules that they postulate and the Courts are bound to enforce the legal rules. The conflict is not of a type, which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights, which conventions prescribe, should be exercised only in a certain limited manner, if at all.[216]

The Supreme Court of Canada also noted in the same decision that conventions do not automatically become law:

> The proposition was advanced…that a convention may crystallise into law. In our view that is not so. No instance of an explicit recognition of a convention as having matured into a rule of law was produced. The very nature of convention as political in inception and as depending on as consistent course of political recognition…is inconsistent with its legal enforcement.[217]

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[214] Heard, Andrew. The Canadian Constitutional Conventions: The Marriage of Law and Politics. Toronto: Oxford Press, 1991. p. 3

[215] Hogg, Peter. Constitutional Law of Canada 3rd Edition. Toronto: Carswell, 1992. p. 18

[216] *Supreme Court of Canada in Reference re: Amendment of the Constitution of Canada* (Nos. 1, 2 and 3) (1981), 125 D.L.R. (3d) 1 at pp. 85-6,

[217] Ibid. at 22

The entrance of the Supreme Court or any Canadian court in the interpretation and enforcement of convention in large scale would be disconcerting. Yet, some scholars argue that this is precisely what happened in the 1981 reference. However, Andrew Head has noted, "If conventions become increasingly justiciable, there is some danger that the democratic quality of Constitutional evolution might be eroded."[218] Commonwealth scholars Rodney Brazier and St. J Robbilliard, who feel that informal rules should not enter into a formal judicial process, have echoed this sentiment,

> To say that a convention can become a rule of law would be to challenge the proposition that Parliament makes laws which are recognized as such by the virtue of the act of law-making whereas conventions, on the other hand, evolve in such a matter which is not necessarily appreciated by those participating in their development and which in any case has not been perceived by them as law-making.[219]

Of course, these are contested positions. There is evidence of the courts making conventions increasingly more justiciable. Nevertheless, the courts should take care not to needlessly make conventions increasingly justiciable, such action has the potential to bring the courts into sharp conflict with Parliament.

G. Preliminary Conclusions

Conventions are essential to the Canadian Constitutional order. They are unwritten rules that govern the way in which the constitution operates. Conventions are also hierarchical. Andrew Heard has classified them in different categories: fundamental conventions, meso-conventions, semi-conventions and infra-conventions.

Conventions also bind the operation of Canada's vice-regals. Many scholars argue that major conventions affecting their offices arose out of the Byng-King dispute in 1926. These scholars argue that in this dispute between the Prime Minister and the Governor General, the Prime Minister was in the right and the Governor General in the wrong. The Canadian electorate in the elections that soon followed voted in favour of

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[218] Heard, Andrew. The Canadian Constitutional Conventions: The Marriage of Law and Politics. Toronto: Oxford Press, 1991. p. 3

[219] Ibid. p. 7

Mackenzie King and this supposedly confirmed this sentiment. However, all these sentiments are overstated. For instance, with respect to conventions, vice-regals as well as other actors must feel bound by them. Additionally, the Imperial Conferences, which formulated several conventions on the Governor General in the aftermath of the Byng-King episode, did not explicitly restrict the powers of the Governor General. The fact that courts cannot enforce convention further limits their power and effect.

Chapter V. Role of GGs and LGs and the royal prerogative.

A. Vice-Regals: The Last Guardians of the Rule of Law

The guardian of the Constitution has been a position that the judiciary, particularly the Supreme Court of Canada, has given itself since the introduction of *Charter of Rights and Freedoms*. One instance of unilateral declaration by the Supreme Court as a Constitutional guardian came in *Hunter v. Southam Inc.* in 1984: "The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."[220] Another declaration came more recently in *Ell v. Alberta* in 2003, "Accordingly, the judiciary's role as arbiter of disputes and guardian of the Constitution require that it be independent from all other bodies."[221]

While certainly the Supreme Court and the judiciary plays a major role in ensuring the proper exercise of the rule of law in Canada, it is not the ultimate authority or the last guardian. While the court does play a vital role in interpreting and enforcing the written constitution, it does not have the authority to enforce convention. Nor should the judiciary have the ability to do so. This entire argument is not intended to diminish the role of the Supreme Court as a constitutionally guardian completely; to say so would be absurd. Instead, it is to illustrate that the Supreme Court shares in the defence of the Constitution with vice-regals. As Edward Schreyer has noted, "… the Office of the Governor General is not an office that has to do with political power but rather that of the custody of the constitution. Between the Supreme Court and the Office of the Governor General there you have the custodian of the Constitution [the lawful and written constitution] and the spirit of the constitution."[222]

Arguably, there is one central feature of the B.N.A 1867 that invalidates all others. This feature is the 'Peace, Order and Good Government' clause, which is part of the job description of Canada's vice-regals. The 'Peace, Order and Good Government' motto encapsulates "two famous maxims in British Common law doctrine: salus *populi est suprema lex* (safety of the people is the supreme law) and *salus republicae est suprema lex* (safety of the state is supreme law.)"[223] One argument holds that the Governor General or the Lieutenant Governor would be justified to use any of their prerogative powers to achieve these ends. However, it is important to consider the limitations of the Supreme Court in enforcing conventions and even written law as well as the vulnerabilities of the Supreme Court.

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[220] Hunter v. Southam Inc., [1984] 2 S.C.R. at 145
[221] Ell v. Alberta, 2003 SCC 35, [2003] 1 S.C.R. at 857
[222] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

The large-scale entrance of the Supreme Court into political affairs was not an intended with Confederation. As provided in the *Constitution Act*, 1867 "Canada was to have a constitution in 'similar in principle to that of the United Kingdom.'"[224] As described by J.R Mallory,

> …what that meant, among other things, was the continuation of the central principle of the British Constitution: that sovereignty was vested in the legislature…the law promulgated by the legislature is the law, and no court can nullify it by finding it in conflict with higher Constitutional principle...the courts implicitly accepted the basic Constitutional notion that the legislature had unlimited power to make law, however, absurd, oppressive, or unreasonable.[225]

Prior to the introduction of the Charter, the only powers of review that the Supreme Court possessed was to determine whether legislation was *intra vires* or *ultra vires*, and to adjudicate division of power disputes between the provincial and federal governments.

Obviously, the role of the Supreme Court of Canada has changed with the introduction of the *Charter of Rights and Freedoms*. Nevertheless, it is important to note some susceptibility in the Court's ability to act as the guardian of the Canadian Constitution. To ensure its supremacy, Parliament was provided with the notwithstanding clause and may exempt itself from judicial review with respect to certain legislation even though this legislation could be detrimental to the rule of law and acceptable political behaviour. As Stephen A. Scott describes section 33, "It effectively allows the assertion of legislative supremacy against all the guarantees of the Charter save those grouped in four rubrics: the so-called 'Democratic Rights' (sections 3 and 4)…the so-called 'Mobility rights' (section 6)…the 'Official Languages of Canada (sections 16 to 22) and "Minority Language Educational Rights" (section 23)."[226] However, vice-regals could act in striking down or refusing assent to proposed laws that have been, or are promised to be, made notwithstanding to the Charter. In the event, that an inappropriate bill was already given Royal Assent (i.e. one that violates the Constitution in law or convention or the rule of law) the appropriate vice-regal actor could summarily disallow it.

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[223] Jalal, Ayesha. "The Politics of a Constitutional Crisis: Pakistan, April 1953-May 1955. " From Low, D.A. Constitutional Heads and Political Crises Commonwealth Episodes, 1945-1985. St. Martin's Press: New York, 1988. p. 64

[224] Mallory, J.R "The Continuing Evolution of Canadian Constitutionalism" from Cairns, Alan & Williams, Cynthia. Constitutionalism, Citizenship and Society in Canada. Royal Commission on the Economic Union and Development Prospects for Canada. Vol. 33. University of Toronto Press: Toronto, 1985. p. 51

[225] Ibid.

Another aspect is the vulnerability of the Supreme Court and the Supreme Court Act to change. The Court is not constitutionally entrenched, as Peter Hogg has stated:

> The Court's existence and jurisdiction are not guaranteed by the Constitution. The Court's existence and jurisdiction depend on the Supreme Court Act, which is a federal statute enacted under S.101 of the *Constitution Act*, 1867. As a matter of strict law, therefore the court could be abolished or radically altered by the federal Parliament.[227]

During the proposals for Constitutional Reform, the Trudeau government would also cite the vulnerabilities of the Supreme Court: "although one of Canada's basic institutions, it exists only by virtue of a federal law (the Supreme Court Act) that any majority in Parliament could repeal or change."[228] Trudeau wanted "to provide a more appropriate status for the court…beyond the capacity of any single government to change [it] unilaterally…"[229]The only Constitutional protection of the court exists in the Charter of Rights of Freedoms in 41 (d) and 42 (d). These provisions only provide protection for the composition of the Supreme Court. While it is not very likely that the Supreme Court of Canada would be outright abolished by the House of Commons it is important to note that the Court could be reformed or weakened.

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[226] Scott, Stephen A. "Entrenchment by Executive Action: A Partial Solution to "Legislative Override" From E.P Belobaba & E. Gertner The New Constitution and the Charter of Rights: Fundamental Issues & Strategies. The Supreme Court Law Review (1982), 4 Supreme Court L.R p. 309

[227] Hogg, Peter. Constitutional Law of Canada 3rd Edition. Toronto: Carswell, 1992. p. 222

[228] Government of Canada. The Constitutional Amendment Bill, 1978: Explanatory Document. Ministry of Supply and Services Canada: Ottawa, 1978. p. 23

[229] Ibid.

Many politicians and scholars show concern over the Supreme Court's intervention into political matters. F.L Morton and Rainer Knopff, who have criticized the Charter Revolution for dismantling "a long tradition of Parliamentary supremacy has been replaced by a regime of Constitutional supremacy verging on judicial supremacy," echo this concern.[230] Knopff and Morton present their basic objection,

> Our primary objection to the Charter Revolution is that it is deeply and fundamentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of representative democracy. The growth of courtroom rights talk undermines perhaps the fundamental prerequisite of decent liberal democratic politics: the willingness to engage those with which one disagrees in the ongoing attempt to combine diverse interests into temporarily viable governing majorities.[231]

It is quite possible that politicians angered at the 'intrusion' of the courts into politics would desire to change the Supreme Court to its more traditional role. Already the courts have noted the influence of governments in the judiciary as noted by the Supreme Court in *R. v. Regan*, [2002],

> The judge shopping in this case was equally offensive. It illustrated another inequality between the Crown and defence, in that only the Crown has the power to influence which judge will hear its case by manipulating the timing of the laying of the charge. Even if this advantage was not ultimately exploited, it must be reasserted that judge shopping is unacceptable both because of its unfairness to the accused, and because it tarnishes the reputation of the justice system.[232]

A recent incident shows that court rulings can also been ignored. Mr. Justice T. David Marshall, an Ontario Superior Court judge, noted on July 25, 2006 that his court orders to remove native protestors from Caledonia, Ontario have been "blatantly disregarded."[233] Marshall would continue noting, "This is a matter at the very heart of the administration of justice…If court orders can be disregarded the whole fabric of democracy falls to pieces."[234]

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[230] Morton, F.L and Knopff, Rainer. The Charter Revolution & the Court Party. Broadview Press: Peterborough, 2000. p. 13

[231] Ibid.

[232] R. v. Regan, [2002] 1 S.C.R. 297 at 330-331

[233] Canadian Press. "Caledonia judge again demands explanation. " The Globe and Mail Online. July 25, 2006.http://www.theglobeandmail.com/servlet/story/LAC.20060725.CALEDONIA25/TPStory/TPNational/Ontario/

Supporters of the Supreme Court cite the popularity of the Charter as a sign of approval of the more interventionist role of that body. However, the popularity of the Supreme Court has been confused with the popularity of the *Charter of Rights and Freedoms*. For instance, the popularity of the Governor General and Lieutenant Governors has not been confused with that of the Queen. The *Charter of Rights and Freedoms* is popular because it entrenches vital and basic rights required in a democracy in the Constitution. At a future date, it would be possible for Parliament institute a veto over the Supreme Court of Canada in instances of interpreting the Charter. This would more clearly regain Parliamentary supremacy. A large portion, if not a majority, of the Conservative caucus of 2006 shares this sentiment.

An impetus for changing and weakening of the Supreme Court of Canada could very well come when the guardianship role of the Constitution is needed most during a dispute between an elected government and the Supreme Court over a contentious issue. Another situation of concern would be in the event of an emergency that requires the implementation of the *Emergencies Act* or the *suspension of habeas corpus*. The implementation of these powers would come with a "real or apprehended war, invasion or insurrection." In such an instance, the relevance of the *Charter of Rights and Freedoms* is debatable as is the applicability of the guaranteed civil liberties provided by it. Walter S. Tarnopolsky and Gerald A. Beaudoin argue that any act or statute that curtail civil liberties contrary to the Charter will have to be judged by the courts whether they,

> …come within the qualifying clause of s.1 namely, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Of course, this issue could be finessed and the emergency measure exempted from ss.2 and 7-15 of the Charter, by explicit use of the override power of s. 33.[235]

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[234] Ibid.

[235] Tarnopolsky, Walter S. and Beaudoin, Gerald-A. The Canadian Charter of Rights and Freedoms-Commentary. Carswell Company: Toronto, 1982. p. 13

This view is not unique, as noted by Claude Bélanger,

> …article one of the Charter allows that rights and freedoms be subjected to such limits as are established by law as long as these limits can be demonstrably justified in a free and democratic society. Article 4 (2) further permits the House of Commons, or a provincial legislature, to be extended beyond the limit of five years 'in time of real or apprehended war, invasion or insurrection'. It is clear, under these articles, that the Charter may not provide much recourse against abuse if a proclamation of war was again to be issued.[236]

However, the permission of the Governor General is required for a declaration of war or emergency powers. A Governor General might be willing to give the Government the benefit of the doubt in the event of emergency or war. The Governor General, not the courts, would command the acquiescence of the government and a returning to normal operations should there be an abuse of emergency powers or if they were not required.

Why else should one view the Governor General and the Lieutenant Governors as the last guardian of the Constitution? The reasons are not limited by virtue of the exhaustive powers provided to the Governor General and the Lieutenant Governors in the *Constitution Act*, 1867. The delegation of the royal prerogative to them gives vice-regals a broader Constitutional mandate. The Office of the Governor General and the Lieutenant Governor are also constitutionally entrenched and the removal of the vice-regal offices would require unanimous consent of the federal Parliament and the provinces. This is something that is not likely to occur anytime soon. The nature of Canadian politics is such that many ordinary political activities require the consent of the Crown. Only the Queen's representative or delegate (i.e. administrator) can exercise such prerogatives. By virtue of this process, the Governor General formally governs at the federal level and the Lieutenant Governors at the provincial level.

In defence of the concept of vice-regals as the last guardian of the Constitution, as Vernon Bogdanor has noted, "some would suggest that the sovereign has the right, and perhaps the duty, to act as a guardian of the constitution."[237] R. MacGregor Dawson and W.F Dawson agree with this conclusion, noting however that, "While the nature of these occasions cannot be defined with any exactness, it may be said that the governor, broadly speaking, will be justified in acting to protect the normal working of the constitution when the usual procedures prove insufficient or inadequate."[238]

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[236] http://www2.marianopolis.edu/quebechistory/readings/warmeas.htm

It might be necessary for a Governor General or a Lieutenant Governor to act contrary to a democratically elected first minister. Ronald Cheffins concurs with the analysis: "To cast aside without question any independent role whatsoever for either the Governor General or the Lieutenant Governors is to remove one of the few-and, in many cases, the only-possible restraints on the actions of the Prime Minister or a provincial Premier."[239]

Claire Mowat, a former lady-in-waiting to Ed Schreyer's wife, Lily Schreyer, raised some valid points of her own, "The GG is the defender of our constitution and I don't think enough Canadians understand that. It's vital. If we only have an elected head of government, there is no insurance that person will stick to the Constitution."[240] Lowell Murray provides an excellent interpretation of the role of the Governor General (that should include the Lieutenant Governors), as "the transcendent, continuing symbol of our existence as a nation, above the political fray, the ultimate safeguard of our Constitutional liberties…"[241] Margaret Banks has argued, "…though the Governor General's role in Canadian government is largely ceremonial, circumstances might arise where he or she might properly act as the Guardian of the Constitution."[242]

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[237] Bogdanor, Vernon. The Monarchy and the Constitution. Clarendon Press: Oxford, 1995. p. 65

[238] Dawson , R. MacGregor and W. F. (revised by Ward, Norman). Democratic Government in Canada. University of Toronto Press: Toronto, 1977. p. 70

[239] Cheffins, R.I. The Constitutional Process in Canada. McGraw-Hill Company of Canada Limited: Toronto, 1969. p. 94

[240] Gilbert, Terry. "Lady-in-waiting found Canada needs symbols; [Final Edition]" Calgary Herald. Calgary, Alta.: Jun 19, 1989. p. B.6

[241] Murray, Lowell. "Which Criticisms are Founded?" From Joyal, Serge (ed.) Protecting Canadian Democracy: The Senate You Never Knew. McGill-Queen's University Press: Montreal, 2003. p. 136

[242] Banks, Margaret. Understanding Canada's Constitution. University of Western Ontario: London, 1991. p. 27

Another aspect in which vice-regals have a clear advantage over the courts is with respect to convention. The Supreme Court is unable to remedy breaches of Constitutional convention, only breaches of Constitutional law. As was noted in *Reference Re: Amendment of the Constitution of Canada* the Supreme Court of Canada noted, "The remedy for a breach of a convention does not lie with the Courts."[243]The Supreme Court of Canada noted in the same ruling that fundamental breaches of convention can be remedied by the Governor General and Lieutenant Governors: "It is because the sanctions of convention rest with institutions of government other than Courts, such as the Governor General or the Lieutenant Governor, or the Houses of Parliament, or with public opinion and ultimately, with the electorate that it is generally said that they are political."[244] With respect to the patriation reference, Governor General Edward Schreyer viewed this ruling by the Supreme Court as an invitation for the Governor General to intervene,

> You should be aware for example, that in 1981 when there was a stated case referred the Supreme Court of Canada about the attempt by the Prime Minister of the day to patriate the constitution with the consent of only one or two of the provinces. The Supreme Court of Canada ruled in the stated case that the attempt to do so would be an infraction if not of the law then certainly of the spirit of the constitution... But it's important to notice the nuance here. They then went on to say that while the remedy for violation of the law of the constitution remained with the Supreme Court, was vested with the Supreme Court, the authority to deal with violation of the spirit of the constitution lies with the Governor General. That 1981 ruling speaks volumes... they said there had been a violation of the law of the constitution they would have intervened, but since it was a violation not of the law but the spirit of the constitution they went so far as to say as explicit as to say this was within the purview of the Governor General. What they were saying was in effect was they were practically inviting the Governor General to feel free to intervene if necessary.[245]

Prime Minister Trudeau knew well enough not to try the patience of Governor General Edward Schreyer on this matter.

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[243] *Reference Re Amendment of the Constitution of Canada*. (Nos. 1, 2 and 3) (Part 2 of 2) [125 D.L.R. (3d)] at 85

[244] Ibid p. 86

[245] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

The inability for Parliament to scrutinize the vice-regal offices in large measure is another reason why they act as last guardians. For instance, the rules and forms of the House of Commons of Canada largely prevent the questioning of the activities of Governor General. Similarly, the same rules apply to all legislatures across Canada. On April 28, 1982 Mr. Cossit questioned Prime Minister Trudeau on the activities of the Governor General with respect to a press interview that Edward Schreyer had given, "Is it customary for the Governor General to advise the Prime Minister in advance of his intentions to hold a press conference or give a press interview."[246]Trudeau's response was to cite Beauchesne's citation 171, which provides the limitations on what may be asked in the House. Specifically, he mentioned sections (gg), (ii) and (nn), which provide that "a question oral or written must not:"[247]

> gg) seek information about matters which are in their nature secret, such as decisions or proceeding of Cabinet, advice given to the Crown by Law Officers. ii) introduce the name of, or contain reflection on, the Sovereign or Royal Family, or refer to influence of the Crown nn) relate to matters which passed outside the walls of the House and do not violate any Bill or motion before the House.[248]

While nearly every subject may be questioned in the House of Commons, the Crown cannot be questioned.

B. Courts can advise but not compel vice-regals

With the Charter Revolution, vice-regals should be more mindful of decisions made by the Supreme Court. The patriation reference established support to an intervention by a Lieutenant Governor or a Governor General to address a blatant violation of Constitutional convention: the unilateral patriation of the Canada's Constitution. In this vein, the Supreme Court in its rulings should more frequently outline a legal course of action for vice-regals intervention. For the sake of brevity and expediency there may be a situation that does not allow the Supreme Court to make a detailed ruling. In this instance, the Supreme Court, as a guardian of the Constitution, should be willing to advice the Governor General more directly. Though such advice is not binding.

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[246] Canada. House of Commons, *Debates*. (April 28, 1982) p. 16704

[247] Beauchesne, Arthur. Rules and Forms of the House of Commons. 4th Edition. The Carswell Company: Toronto, 1958. p. 147

[248] Ibid. p. 147-48

There is a precedent long before the introduction of Charter of the judiciary providing direct advice to a vice-regal. In Manitoba during 1914-15, allegations arose that the government under Premier Sir Rodmond P. Roblin had defrauded taxpayers and diverted public funds into party coffers by overestimating the cost of the construction of the Manitoba legislature building. As Rand Dyck notes, "The Lieutenant Governor felt compelled to intervene and appointed a royal commission. Its report not only exposed serious contract violation in which the public purse had been defrauded of nearly $1 million, but also revealed that much of that money had been kicked back into party coffers."[249] The Lieutenant Governor made it clear that the appointment of a royal commission would require the support and cooperation of the Premier. The Commissioner would be required to be "independent and fair minded" and had the Premier not acquiesced to the request of the Lieutenant Governor and agreed to a royal commission, the Lieutenant Governor would have dismissed him.[250]

The Attorney General serves as the traditional advisor to the Lieutenant Governor on legal matters. However, prior to the Royal Commission in Manitoba, the Lieutenant Governor, Sir Douglas Cameron, was unaware at the extent of the government in these illegal activities, but he was nonetheless apprehensive about obtaining advice from the Attorney General. Hugh R. Ross notes that the Lieutenant Governor,

> ...acted upon the advice of Chief Justice Howell, not upon the advice of his ministers, as provided by Constitutional practice. The chief justice, testifying before a commission later stated that Sir Douglas Cameron had called him in to give legal advice since the Hon. James Howden the provincial attorney general, no longer possessed his confidence. Of course, Constitutional practice was violated...the Lieutenant Governor, as Chief Justice Howell swore, refused to

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[249] Dyck, Rand. Provincial Politics in Canada: Towards The Turn of the Century. Prentice Hall Canada: Scarborough, 1996. p. 299

[250] Cheffins, Ronald I. "The Royal Prerogative and the Office of Lieutenant Governor. " Canadian Parliamentary Review vol. 23, no.1 2000 http://www.parl.gc.ca/Infoparl/english/issue.htm?param=74&art=163http://www.parl.gc.ca/Infoparl/english/issue.htm?param=74&art=163p. 3

> accept the advice of his ministers…His Honour had sought advice and had been assured on the authority of the chief justice just how far he could go, and he acted on the advice, however irregular it may have been in the British Parliamentary system.[251]

Interestingly, the Roblin scandal bears likeness to modern day scandals in government. Modern vice-regals should keep in mind the actions of Sir Douglas Cameron in these circumstances. Similarly, in the case of the 1975 Whitlam dismissal in Australia, the Governor General sought the advice of the Australian Chief Justice before acting. With the Charter Revolution, it is now common for that court to intervene in political matters. Accordingly, the actions of the vice-regals should seek out the opinion of the judiciary to ensure their course of action is within the law.

Traditionally, courts cannot bind vice-regals. This rationale is multi-faceted. Firstly, the court prerogative of *mandamus,* which "lies to compel the performance of a public duty," is largely not applicable to the Crown.[252] The Crown possesses certain immunities and the Governor General and the Lieutenant Governor as the personal representatives of the Canadian monarch are included. Peter Hogg and Patrick Monahan present an explanation of why the Crown is immune, "First, the Courts were the Queen's Courts and "there would be incongruity in the Queen commanding herself. Secondly, it would be impossible to punish a breach of the order by committing the Queen for contempt."[253]

The Canadian political system has evolved and several options that could be applicable for the courts to bind the Governor General or the Lieutenant Governor. One is the option of persona designate, where coercive measures are directed not at the Crown or vice-regal, but at that servant personally to act in the official capacity. As Hogg and Monahan explain, "…if the public duty designates the particular servant who is to perform the duty, and thereby imposes the duty on the servant as persona designate, then mandamus will lie against the designated person."[254]

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[251] Ross, Hugh R. Thirty-Five Years in the Limelight Sir Rodmond p. Roblin and is times. Farmer's Advocate of Winnipeg: Winnipeg, 1936. p. 166-67

[252] Hogg, Peter W and Monahan, Patrick. Liability of the Crown. 3rd Edition Carswell Thomson: Scarborough, 2000. p. 43

[253] Ibid. p. 44

A more legitimate option of binding a Governor General comes with the application of s. 24 of the *Charter of Rights and Freedoms*. Hogg and Monahan argue, "Where a duty is imposed by the Charter of Rights, it has been held that the Crown's immunity from mandamus is abolished by S. 24 of the Charter which authorizes a Court of competent jurisdiction [most likely the Federal Court of Canada or the Supreme Court] to grant such remedy as the court considers appropriate and just in the circumstances."[255]However, an apt Governor General or Lieutenant Governor, conscious about the proper role of his office, would have most likely acted before a court order was necessary. It would be a dangerous precedent for the Governor General or the Lieutenant Governor to ignore a ruling made by a court of law. However, this might be necessary. For instance, this would be the case should the Supreme Court become co-opted by a government and rule not according to the law, but in the interests of a government acting recklessly.

If in this circumstance, a court might command a vice-regal to use one of his prerogatives to an unjust effect, a Governor General could violate the court order and grant himself a pardon. The Governor General does posses some immunity and recourse that places him above the law as long as the governor is defending a higher legal order. A Governor General might be also willing to invoke the viceroy status, a status that ensures that he or she is immune from prosecution or legal force. A Governor General could also invoke some other elements of his *Letters Patent* and command the obedience of the judiciary should it come to that point. A Lieutenant Governor could seek the legal protections afforded by the Governor General to ensure that his actions are so too shielded.

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[254] Ibid.

[255] Hogg, Peter W and Monahan, Patrick. "Liability of the Crown." 3rd Edition Carswell Thomson: Scarborough, 2000. p. 42

Even if the courts have the best interest of Canada in mind, it would be dangerous for a court to presume that it can order a vice-regal representative in Canada to do something, because that individual may not want to comply. It would be tantamount to a politician interfering in a legal matter before the courts would violate the highest order of Canadian Constitutional convention. There is a clear separation of powers and the courts cannot presume to have greater authority than the highest order of the executive: the monarch's representative. Vice-regals have the final say on all law proposed in Canada, hence the need for Royal Assent. As well, the highest judicial official in Canada, the Chief Justice of the Supreme Court, is subordinate to the Governor General, as the Deputy Governor General. Some other members of the Supreme Court are Deputies of the Governor General as well. As it was an incongruity of the Queen to command herself, it would be an incongruity for an inferior officer of the Crown to command a superior one.

C. The Royal Prerogatives

William the Conqueror created the Royal Prerogatives in 1066 when he crowned himself on Christmas Day in Westminster Abbey. William argued that he possessed nearly exhausitive powers as King, needed to steer the ship of state: "I vow before the altar of Peter the Apostle and in the presence of the clergy and the people to defend the holy churches of God and their governors, to rule over the whole people subject to me justly and with royal provenance to enact and preserve rightful laws and strictly to forbid violence and unjust judgments."[256]

The Royal Prerogatives are still relevant to Canadians today. They are essential to the governance of Canada. The Royal Prerogatives are one source of a Governor's power and of his office. As Peter Hogg aptly notes, a 'gap' exists in the *Constitution Act*, 1867: "the office of Governor General is nowhere created by the Act and no rules are provided for the appointment of that Officer."[257] While the Office of Governor General, like that of Prime Minister has never been formalized in a written Canadian Constitution, it, not the Office of Prime Minister, "is still constituted by the royal prerogative."[258]

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[256] United Kingdom Parliament. Select Committee on Public Administration Minutes of Evidence Examination of Witnesses (Questions 1-19) Thursday April 10, 2003 RT HON WILLIAM HAGUE MP AND RT HON TONY BENN MP http://www.publications.parliament.uk/pa/cm200203/cmselect/cmpubadm/642/3041003.htm (accessed July 28, 2006)

Dicey described the Royal Prerogatives as "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown."[259] Blackstone noted the prerogatives were something that, "the King enjoys alone, in contradistinction to others and not to those which he enjoys with any of his subjects: for if once any prerogative of the Crown could be held in common with the subject, it would cease to be a prerogative any longer."[260]Peter Hogg has described the royal prerogative as "the powers and privileges accorded by the common law to the Crown."[261] Mallory has defined the royal prerogative of the sovereign "as powers to act independent of ministerial advice."[262] One definition of prerogative powers would be conventions on the administration of the monarch's powers. While, conventions bind vice-regals under responsible government, it is important to note that the Royal Prerogatives are conventions as well. One argument might submit they are superior to regular conventions simply because they convey the authority of the monarch.

The royal powers, or prerogatives, may seem tyrannical in the context of a modern democracy. The *Letters Patent* 1947, 1977 and 1988 transferred nearly all the powers and authorities of the Sovereign to the Governor General. The Lieutenant Governors already possessed their requisite prerogative powers. The execution of prerogative powers was described Paul Lordon, "[they] are exercised by the Governor General at the federal level and by the Lieutenant Governor in each province."[263]Bogdanor has described the powers executable by the Governor General,

> …the Crown, which under prerogative powers, can proclaim war or ratify treaties without the consent of Parliament. He or she is also a part of the legislature, the

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[257] Hogg, Peter. Constitutional Law of Canada 3rd Edition. Toronto: Carswell, 1992. p. 6
[258] Ibid.
[259] Dicey, A.V. Law of the Constitution 10th ed. London: Macmillan, 1965. p. 424.
[260] Lordon, Paul. Crown Law. Butterworths: Toronto, 199. p. 70
[261] Bogdanor, Vernon. The Monarchy and the Constitution. Clarendon Press: Oxford, 1995. p. 65
[262] Mallory, J.R. The Structure of Canadian Government, rev ed. Toronto: Gage Publications, 1984 p. 34
[263] Lordon, Paul. Crown Law. Butterworths: Toronto, 1991. p. 71

> king or queen in Parliament and in theory, could assent to or veto all legislation in accordance with his or her own political predilections. He or she is, finally, the source of justice, in that the courts are the sovereign's courts and dispense his or her justice throughout the realm.[264]

The prerogative powers also include, as Linda Sossin outlines,

> The Crown prerogative once constituted the central source of executive authority in England and its colonial holdings. Today, it remains the source for a disparate set of executive powers, including foreign affairs (*e.g.* treaty-making and diplomatic appointments); defence and the armed forces (*e.g.* sending peacekeepers abroad); passports, pardons, and the prerogative of mercy; the hiring and dismissal of certain public officials; honours and titles; copyright over government publications; the law of heraldry; incorporating companies by royal charter; collecting tolls from bridges and ferries; and the right to proclaim holidays. This list is by no means exhaustive.[265]

W.A Matheson outlines some additional prerogative powers with respect to Canada; included are the "…summoning, prorogation, and dissolution of Parliament…the originating and recommending of money bills to Parliament."[266] Some elements of the Royal Prerogatives allow vice-regals to act independent of ministerial advice, as Paul Lordon has argued,

> The Governor Generally ordinarily, as a matter of convention, exercises these powers with the advice of the Prime Minister but retains a discretion to refuse to follow such advice. This discretion has rarely been exercised in Canada and is generally regarded as a recourse of last resort to be invoked only in the most exceptional circumstances.[267]

In normal circumstances, the execution of the prerogative power is as described by the Conservative Party Democratic Taskforce in Britain: "We know the Constitutional theory at the moment is that this is a royal prerogative exercised effectively by the Prime Minister and ministers and she exercises the prerogative on their advice."[268] Neither the cabinet nor the Prime Minister is given a blank slate in the execution of prerogative powers. The House of Commons is anxious to play an increasing role in the administration of the execution of the prerogative powers: "We also know that in practice when prime ministers commit themselves to combat they can only continue to do so if they get Parliamentary support for it. The process is dealt with just as an ordinary matter of policy."[269]

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[264] Bogdanor, Vernon. The Monarchy and the Constitution. Clarendon Press: Oxford, 1995. p. 65

[265] Sossin, Lorne. "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on Black *v.* Chrétien. " (2002) 47 McGill Law Journal p. 440

[266] Matheson, W.A. The Prime Minister and the Cabinet. Methuen: Toronto, 1976. p. 14

[267] Lordon, Paul. Crown Law. Butterworths: Toronto, 1991. p. 70

[268] www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/999/const290306.pdf -

D. Prerogatives cannot fall into disuse

Paul Lordon has written that there is uncertainty of whether prerogative powers can fall into disuse,

> Some commentators advocate the extinction of all prerogatives that have fallen into disuse. Others recommend that only anachronistic prerogatives should be extinguished in this manner. According to the view, prerogatives that would operate usefully and without gross anomaly if they were reinstated should be capable of revival. The case law to date offers no decisive resolution of this issue.[270]

The relationship between the prerogative powers and the Governor General becomes clear with the *Letters Patent, 1947*. In the *Letters Patent*, 1947 several Royal Prerogatives became codified. This document is still a matter of law and supra-Constitutional powers. Ronald Cheffins outlines some of the prerogatives provided in it: "The appointment of the prime minister and cabinet ministers; the appointment of ambassadors; the summoning, proroguing, and dissolution of Parliament; the declaration of war, and the signing of treaties."[271] Ronald Cheffins has also presented a case for the continued full effect of prerogative powers. Cheffins also submits that prerogatives, "…these very important powers remain still within our Constitutional structure and in 1938, the Supreme Court of Canada held that even though a power has not been used for a long time, it does not mean that it is no longer legal authority."[272]

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[269] Ibid.

[270] Lordon, Paul. Crown Law. Butterworths: Toronto, 1991. p. 70

[271] Cheffins, Ronald I. "The Royal Prerogative and the Office of Lieutenant Governor. " Canadian Parliamentary Review vol. 23, no.1 2000 http://www.parl.gc.ca/Infoparl/english/issue.htm?param=74&art=163http://www.parl.gc.ca/Infoparl/english/issue.htm?param=74&art=163

[272] Ibid.

The Royal Prerogatives may be altered with new legislation. However, the lack of such explicit action implies that the Royal Prerogatives are still in full force. Paul Lordon notes that the replacement of a royal prerogative is not possible unless there is a complete remedy provided with new legislation.[273]Such legislation must specifically mention the Royal Prerogatives or how the Crown will be bound as "the presumption of non-applicability of statues to the Crown has been codified in all Canadian jurisdiction where it still exists."[274] As noted by the Federal Interpretation Act Section 17 c. I-21, "No enactment is binding upon Her Majesty or affect Her Majesty or Her Majesty's right or prerogatives in any manner, except only as therein mentioned or referred to in the enactment."[275] Any purported change to the Royal Prerogatives such as their inapplicability due to disuse would be in contravention of the law, namely the Federal Interpretation Act Section 17 c. I-21. Ultimately, the Governor General or the Lieutenant Governors in their respective right of the Crown still have a final say in any change to the royal prerogative, as any change to them requires Royal Assent.

E. Prerogatives not fully divested to the Elected Executive

With respect to exercise of prerogatives, the First Minister and the cabinet cannot claim that all Royal Prerogatives were transferred to them. Noel Cox has noted the reality, as confirmed by *Chrétien v. Black*,

> As members of the Privy Council, the Prime Minister and other Ministers of the Crown may also exercise the Crown prerogative." This conclusion was based upon the judgement of Wilson J. in Operation Dismantle that the prerogative power may be exercised by cabinet ministers and therefore does not lie exclusively with the Governor-General. This is perhaps an unfortunate choice of words. It does not mean that a minister can exercise a prerogative power, but rather the exercise of the prerogative is on the advice of these ministers... By convention, the Governor-General exercises her powers on the advice of the Prime Minister or Cabinet. Although the Governor-General retains discretion to refuse to follow this advice, in Canada that discretion has been exercised only in

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[273] Lordon, Paul. Crown Law. Butterworths: Toronto, 1991. p. 125
[274] Ibid. p. 121
[275] *Federal Interpretation Act Section*, R.S.C, 1985 17 c. I-21

> the most exceptional circumstances. This was an unexceptional review of the Constitutional position.[276]

A recent example of a minister invoking a royal prerogative personally comes with former Minister of Foreign Affairs Bill Graham suspending the passport of Abdurahman Khadr. Graham had been acting on the advice of information provided by the Canadian Security and Intelligence Service. At the time, the Canadian Passport Office did not have the authority to deny the issuance of a passport for national security reasons. Graham was criticized for his actions, "In exercising the royal prerogative, Graham was 'making up the rules as he goes along' and had no legal right to deny Khadr a passport, the prominent civil rights lawyer argued yesterday."[277] Justice Andrew Mackay of the Federal Court ruled that Khadr would have the right to challenge the execution of the royal prerogative. Clayton Ruby, Khadr's lawyer, argued the ruling was "a victory against ministerial arrogance. It's a victory for every little Canadian whoever thought he had a right to a passport and that he and the minister were equal in law. It's very significant, because the whole idea of equality under the law is at stake here, as well as the whole question of whether royal prerogative can be exercised by a minister."[278]

In 1997, the Ontario Provincial government attempted to use the royal prerogative to amalgamate five neighbouring cities with Toronto. The provincial government appointed a Board of Trustees by cabinet order to review and approve the new mega city. This approval and the authority of the cabinet order were subsequently challenged. The government argued that the royal prerogative gave them the authority to do so. NDP Leader Howard Hampton described the result, "They attempted to say they had the power that kings in the 17th century had. The judge ... said `Get out of here. You don't have any royal prerogative. You don't have any power to get around the legislature."[279]

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[276] Cox, Noel. Black v Chrétien: Suing a Minister of the Crown for Abuse of Power, Misfeasance in Public Office and Negligence. Paper presented at the Australasian Law Teachers' Association annual conference hosted by Murdoch University School of Law, Perth, Western Australia September 29 - October 2 2002. http://www.murdoch.edu.au/elaw/issues/v9n3/cox93_text.html

[277] Yelaja, Prithi and Shephard, Michelle. Khadr can appeal for passport:[ONT Edition]Toronto Star Toronto, Ont.: Dec 11, 2004. p. A14

[278] Ibid.

F. Judicial Review of Prerogative Powers

With respect to the powers of vice-regals in Canada, tradition has held that,

> The reserve powers have been regarded as non-justiciable although within our system of Constitutional government they are as important as legal rules for determining the validity of actions taken by the Sovereign…the exercise of the reserve power has been immunised from more traditional bases of judicial review by the fact they are rules of convention…the courts have forborne.[280]

While the scope and powers of the Crown were historically not subject to review by the courts, there has been some recent investigation by the courts into the effect and force of some prerogative powers as found in *Richard George Chiasson (Plaintiff) v. Her Majesty the Queen (Defendant)*,

> The Supreme Court of Canada has held that the Crown prerogative may be subject to judicial scrutiny to determine whether an impugned decision is Constitutional. Further, if a prerogative power has been supplanted by a statutory one, the exercise of the statutory power is subject to review. Brown and Evans state in *Judicial Review of Administrative Action in Canada* that even when judicial review of an exercise of the prerogative power is unavailable, a court can still be called upon to decide whether the prerogative power exists in law, and if it does, how broad the power is and whether the action taken fell within its scope.[281]

The prerogative powers are subject to the *Charter of Rights and Freedoms*, specifically, Section 32 1 a), which defines the applicability of the Charter in Canada which includes, "the Parliament and government of Canada in respect of all matter within the authority of Parliament including all matters relating to the Yukon Territory and

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[279] Blackwell, Tom. Ruling a setback for Toronto merger:[Final Edition]. Standard St. Catharines, Ont.: Feb 26, 1997. p. A3

[280] Sossin, Lorne. "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on Black *v.* Chrétien. " (2002) 47 McGill Law Journal p. 440

[281] Richard George Chiasson (*Plaintiff*) *v.* Her Majesty the Queen (*Defendant*) *Indexed as: Chiasson v. Canada (T.D.)* Trial Division, Aronovitch p. --Vancouver, January 19; Ottawa, May 22, 2001. reports.fja.gc.ca/fc/2001/pub/v4/2001fc28812.html - 59k

Northwest Territories."[282] The Crown and its representatives are part of Parliament and therefore subject to the Charter. The Supreme Court of Canada held the same views in *Operation Dismantle*,

> Marceau J. would have allowed the appeal on the additional ground that the *Charter* did not give the courts a power to interfere with an exercise of the royal prerogative, especially when issues of defence and national security were involved. However, a majority of the Court (Pratte, Le Dain and Ryan JJ.) was of the opinion that the *Charter* did apply to decisions taken in the exercise of the royal prerogative. Hugessen J. did not deal with this question.[283]

However, some courts have not demonstrated an interest to intervene review the prerogative powers, this situation occurred in *Black v. Chrétien*. However, Mr. Justice Patrick LeSage would anti-climatically rule that the prerogative powers were still not justiciable. Linda Sossin nonetheless cites the importance of the courts of even considering Royal Prerogatives,

> *Black* represents, at first glance, a significant and positive watershed in Canadian public law. The Ontario Court of Appeal has confirmed that the Crown may be civilly liable for the misuse of a prerogative power. This judgment has helped to eliminate an obsolete vestige of Canada's monarchical past.[284]

The negative aspect of the rulings perhaps, according to Sossin, outweighed the positive findings and established the force and effect of the prerogative powers:

> However, as I argue below, by finding Black's claim against Prime Minister Chrétien to be non-justiciable, the court left intact a sphere of executive authority that is effectively immune from the rule of law. This is not an acceptable or a justifiable immunity, even for (and, perhaps, especially for) a Constitutional Monarchy rooted in the common law.[285]

As such, many of the traditional prerogative powers, some of which were codified in the *Constitution Act*, 1867 and *Letters Patent*, 1947 should be examined.

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[282] *The Charter of Rights and Freedoms*. Sect 32 1a)

[283] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at 27

[284] Sossin, Lorne. "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on Black *v.* Chrétien." McGill Law Journal (2002) 47 p. 439

[285] Ibid.

G. Emergency, reserve or discretionary powers of the Lieutenant Governor and the Governor General

Eugene Forsey has argued rather forcefully that Lieutenant Governors and Governors General have considerable discretionary powers rooted in statute and prerogative. These provisions allow them to refuse the advice of their ministers. As noted in Saturday Night on December 1, 1951, "Frank Flaherty (in the Nov. 17 issue) says the Governor General's 'act of state are nearly all on the advice of his ministers which he may not reject'…This is just Liberal party folklore."[286] Frank Mackinnon has provided an apt description of the functions of vice-regals in Canada with respect to their discretionary power,

> The Office of the Governor General and the Lieutenant Governor are Constitutional fire extinguishers with a potent mixture of powers for use in great emergencies. Like real extinguishers, they appear in bright colours and are strategically located. But everyone hopes their emergency powers will never be used; the fact they are not used does not render them useless; and it is generally understood there are severe penalties for tampering with them.[287]

Forsey has also provided a long list of scholars, who support the concept of reserve powers, "Among the writers on the Constitution, Austin, Hearn. Todd, Dicey, Anson, Low, Marriot, Keith and Ramsay Muir have all emphatically asserted the existence of a reserve power…Lowell, Jenks, Jennings and Asquith, and even Laski, all admit a greater or less degree of such power."[288]Norman Ward has written that the discretionary powers of the Governor General and Lieutenant Governors act as a deterrent to abuses of power by first ministers: "Incidents of this kind will happily be rare; but in a constitution which depends in large measure upon the proper observance of custom rather than law, an emergency insurance against a possible abuse of some of these understandings is not without value. The mere existence of such a power and the knowledge that it can be invoked will almost certainly suffice to prevent the occasion for its exercising arising at all."[289]

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[286] Hodgetts, J. F. The Sound of One Voice: Forsey, Eugene and his Letters to the Press. University of Toronto Press: Toronto, 2000. p. 119

[287] Mackinnon, Frank. The Crown in Canada. McClelland and Stewart West: Calgary, 1976. p. 122

[288] Kerr, John. Matters for Judgment: An autobiography. The MacMillan Company of Australia: Melbourne, 1978. p. 219

H. Refusal of Dissolution and Forced Dissolutions

The ability for a Lieutenant Governor or a Governor General to dissolve or refuse to dissolve the Legislature or Parliament for general elections contrary to the advice of the first minister is contested. Peter Aucoin and Lori Turnbull support an assertion made by the late Senator Eugene Forsey who,

> …defended the right and power of a governor to refuse a request for dissolution. In certain circumstances he argued, a governor's exercise of this discretion might be the only Constitutional check on the first minister. The power to refuse dissolution, in other words should not be rejected as illegitimate or improper from a democratic perspective. Indeed, the essential role of the Crown under responsible government is to protect and preserve the constitution of responsible government itself.[290]

Peter Aucoin and Lori Turnbull's opinion is that the Governors General discretion should be applicable to at least one instance, "there is now considered to be only one situation where it is certain whether a governor might not, even should not, grant dissolution."[291] This circumstance comes when a party has lost the confidence of the House in the immediate aftermath of an election. Additionally, this should also occur if a government finds itself in a minority position after the general elections demands a general election in order to obtain a majority. Peter Noonan does note a United Kingdom convention that has particular relevance to Canada, "In the United Kingdom it is considered that the Sovereign may be justified in refusing a dissolution where the existing Parliament remains capable of discharging public business, or where an alternative government could govern for a reasonable length of time."[292]

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[289] Dawson, R. MacGregor and W.F. Democratic Government in Canada. University of Toronto Press: Toronto, 1977. p. 74

[290] Aucoin, Peter and Turnbull, Lori. "Removing the Virtual Right of First Ministers to Demand Dissolution. " Canadian Parliamentary Review Summer 2004 p. 17

[291] Ibid.

[292] Noonan, Peter. The Crown and Constitutional Law in Canada. Srpinoon Publications: Calgary, 1998. p. 85

In circumstances other than these, it would prove difficult, but not impossible, for a governor to exercise any independent discretion in the execution of the prerogative power of dissolution. This is not due to a lack of power, as vice-regals in Canada are legally allowed, "almost complete discretion in the exercise of the Crown's power to grant dissolution."[293] Aucoin and Turnbull also argue that, "No Constitutional expert denies that the Crown in Canada possesses a residual power to deny a first minister's request for dissolution."[294]However, the problem lies in the public perception as Aucoin and Turnbull have noticed. The issuance of the prerogative power is nearly always automatically given and for any governor to differ in this respect would "risk politicizing the matter of the Crown's powers," and the sordid legacy of the Byng-King affair would once again be brought to the forefront.[295]

This is not to say that a governor should abstain from doing so if it is required merely for the sake of how it appears in the public. If there is an event so serious that would require a governor to refuse the advice of the first minister with respect to dissolution, unquestionably the governor should proceed nonetheless. The rationale for an appointed rather than an elected governor is that this individual is motivated to act in sober thought and ensure the right course of action irrespective of an election date. Following this sentiment, Governor General Edward Schreyer cared very little about the controversy the Byng-King case caused and instead cared about the need for sober reflection, which he believed one of the fundamental aspects of his post:

> In 1979, when I tried to-in spite of 1926 King Byng thing-I tried to reassert the point even if only for a few hours that the Governor General was not obliged to automatically grant a dissolution to minority government Prime Minister in the first twelve months of office and I said it then and I will say it again that this is a perfectly valid course of action for a Governor General to follow, because he has to be careful if there is no hope of a stable working arrangement. The Governor General if he's wise will give the dissolution to the Prime Minister but he should not do it automatically in a matter of minutes, he should do it after sober

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[293] Aucoin, Peter and Turnbull, Lori. "Removing the Virtual Right of First Ministers to Demand Dissolution. " Canadian Parliamentary Review Summer 2004 p. 17
[294] Ibid.
[295] Ibid.

> reflection and in a matter of hours, not minutes. That was what the 1979 controversy was all about. I have no regrets. I would do it all over again.[296]

The power to refuse dissolution has also been confirmed in Great Britain since the 1926 Imperial Conference and the Byng-King case, as noted by Eugene Forsey, "In Britain the power to refuse certainly still exists. Sir Winston Churchill said so in 1944; so did Lord Attlee in 1952 and again in 1959."[297] Another British view came in 1974 from the Leader of the Opposition Edward Short, who noted, "Constitutional lawyers of the highest authority are of the clear opinion that sovereign is not in all circumstances bound to grant a Prime Minister's request for dissolution."[298]

Another instance where a Governor General would be able to show some discretion in refusing a dissolution, comes with a minority government, especially if that government is defeated very early into its term. As Edward Schreyer has noted,

> No government in the first half of a term has the automatic entitlement to dissolution and writs for an election. If there is even the remotest chance of an alternative, that's what it's all about that's what the prerogative power of the Governor General's office is all about. Here's the key. The Governor General acts only on the advice of the first minister who has the confidence of the House of Commons. However, if the Prime Minister loses the confidence of the House of Commons ipso facto and immediately the first ministers advice to the Governor General is no longer advice it becomes merely suggestion and there's where 99 out of a hundred included scholars of politics miss the point.[299]

A Governor General may also want to force a dissolution if the government was attempted to use it as a means to escape scrutiny over a scandal or some other impropriety. This is the situation that Lord Byng was faced with when he refused Mackenzie King's call for a dissolution. Most will agree that vice-regals can indeed dissolution in extreme circumstances. Peter Noonan is of the opinion that the Sovereign's representative "does not have the Constitutional power to force a dissolution of Parliament."[300] As Noonan would himself note this argument is only applicable in cases of a majority government and has no basis in a minority government situation.

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[296] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

[297] Forsey, Eugene. "The Problem of 'Minority Government' in Canada. Canadian Journal of Economics and Political Science. vol. 30 no.1 February 1964. p. 5

[298] Marshall, Geoffrey. Constitutional Conventions: The Rules and Forms of Political Accountability. Clarendon Press: Oxford, 1984. p. 38

[299] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

Moreover, Peter Noonan does not provide an argument as to why the Sovereign's representative does not have the Constitutional power to force dissolution, although it is most likely this course would break a convention of following ministerial advice. Noonan does provide a rationale, shared by Mallory, that a dissolution requires use of the Great Seal of Canada at the federal level, and royal seal for the provinces at the provincial level. These instruments are loaned for safekeeping to a member of the Cabinet. Additionally, the use of the Great Seal of Canada, or royal seal, requires approval by a quorum of members of the Privy Council of Canada or Executive Council at the Provincial level. This argument subscribes to a belief that in the event that a governor would attempt to force dissolution its temporary guardian would not provide the seal on request. This would also suppose that the Privy Council or Executive Council would be unwilling to vote in favour of its use.

While this argument could limit forced dissolution at the provincial level, the same is not true of the federal level. The Governor General has considerably more powers at his disposal. The first concern, the custody of the seal, could be rectified easily enough as under Article III of the *Letters Patent*, the Governor General is conferred with custody of the Great Seal of Canada and the possession by a minister could be viewed as a loan rather than ownership. Under Article IX, the Governor General could command the minister in custody of the great seal for its return or he could petition the courts for its return. Failing acquiescence to such a command or cooperation from the courts, the Governor General could use the same article, or simply by virtue of being Commander-in-Chief, and command police or military to confiscate the property for the Crown. Despite this debate over the possession of the Great Seal of Canada, there are academics that support the assumption that a governor can force dissolution.

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[300] Noonan, Peter. The Crown and Constitutional Law in Canada. Srpinoon Publications: Calgary, 1998. p. 84

The argument presented for a governor refusing a dissolution is equally applicable for forcing a dissolution. Such a circumstance of dissolution, would have to require the government being engaged in grievous acts (i.e. violating the rule of law or the law of Constitution both written and unwritten.) Most likely, such a blatant and grievous act would result in a vice-regal proposing dissolution and would be enough for the first minister to do the honourable thing and resign, although this cannot be assumed. A modern discussion of forced dissolution came in Canada during 1981 and 1982 after Governor General Edward Schreyer mused he might have been tempted to use this power. This will be elaborated on later.

I. Dismissal

The one clear case in which a Governor General or a Lieutenant Governor may dismiss a first minister comes when he or she has lost the confidence of the legislature or Parliament. Forsey had confirmed that many other scholars share his views, "of the power to dismiss there is not the slightest doubt. It is supported by such well-known writers on the constitution such as Dicey, Anson, Keith and Evatt, to mention only a few."[301] Frank Mackinnon has noted, "Another power of the government increased and controlled by a governor's store of powers concerns the dismissal on ministers. Part V of his *Letters Patent* enables the Governor General "to remove from his office, or to suspend from the exercise of the same, any person exercising any office within Canada."[302] For example, the Governor General could dismiss the Prime Minister, the Chief of the Defence Staff, Supreme Court Judges and the Mayor of Edmonton should he or she desire. Mackinnon has noted that the Lieutenant Governor possesses similar powers within the province.[303]

The Supreme Court of Canada ruled in *Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R 753* that there is a clear situation that would require the intervention of a Governor General and conversely of a Lieutenant Governor:

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[301] Forsey, Eugene. "Extension of the Life of Legislatures." The Canadian Journal of Economics and Political Science, Vol. 26, No.4 (November 1960) p. 612
[302] Mackinnon, Frank. The Crown in Canada. McClelland and Stewart West: Calgary, 1976 p. 109
[303] Ibid.

> …if after a general election where the opposition gets the majority at the polls the government refused to resign and clung to office, it would thereby commit a fundamental breach of convention, one so serious that it could be regarded as tantamount to a coup d'etat. The remedy in this case would lie with the Governor General…who would be justified in dismissing the ministry and in calling the opposition to form the government.[304]

Edward Schreyer has provided some other instances that would require the Governor General or a provincial Lieutenant Governor to dismiss a first minister,

> If that government should a) lose the confidence of the Parliament or Legislature or b) if the first minister should act in a way that indicates *non copus mentus* in other words losing his mental faculties and there isn't time to wait for a high court case decision. Or if the government is attempting to force an election in less than, you know, in the first year of government since the previous election; then the Governor General or the Lieutenant Governor would be, if they had some courage and resolution, should feel up to the task of saying no, but it'll take some resolution, some determination, some courage.[305]

Eugene Forsey provided some other instances where a Governor General or Lieutenant Governor might be required to dismiss a first minister: "It is, I think, common ground among Constitutional authorities that if a prime minister were faced with serious charges of bribery and corruption and refused to advice the summoning of Parliament to deal with the charges, the Crown could dismiss him and appoint a new prime minister who would tender the necessary advice."[306]Norman Ward concurred with this point of view saying,

> While the nature of these occasions cannot be defined with any exactness, it may be said that the governor, broadly speaking, will be justified in acting to protect the normal working of the constitution when the usual procedures prove insufficient or inadequate. Thus, if a prime minister were to accept a bribe and were to refuse either to resign or to advise the governor to summon Parliament to deal with the matter, the Governor General could with perfect Constitutional propriety dismiss him from office.[307]

The end of a first minister's tenure automatically means an end of the ministry as noted by Adam M. Dodek, "The day the Prime Minister dies or the Governor General accepts his or her resignation is the last day of a ministry and by operation of law the cabinet as a body ceases to exist."[308]

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[304] Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R 753 at 882

[305] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

[306] Hodgetts, J. F. The Sound of One Voice: Forsey, Eugene and his Letters to the Press. University of Toronto Press: Toronto, 2000. p. 125

[307] Dawson R. MacGregor and W.F. Democratic Government in Canada. University of Toronto Press: Toronto, 1977. p. 74

The dismissal of Prime Minister Gough Whitlam by Governor General Sir John Kerr in Australia in 1975 and the very near dismissal of British Columbia Premier Bill Van der Zalm by Lieutenant Governor David Lam in 1991, demonstrate that the power of dismissal is still very much alive in the Commonwealth and in Canada.

J. Appointment of a First Minister.

Unlike the United States, there is no clear succession mechanism in the Canadian Constitution. Canada has never had a Prime Ministerial assassination and no sitting Prime Minister has died in office since the 1890's, so there has been a relative lack of concern on this issue. As Fred Schindler notes, the Governor General has only appointed the Prime Minister at his own discretion on two occasions since Confederation:

> … in 1873 when Lord Dufferin asked Alexander Mackenzie, as opposed to Edward Blake or Alexander Galt, to form a new ministry to replace that of Sir John A. Macdonald, and in 1926 when Lord Byng chose Arthur Meighen to form a new government instead of allowing William Lyon Mackenzie King a dissolution.[309]

Lieutenant Governors and the Governors General have the traditional role in finding an appropriate first minister in the event of death. Adam Dodek views this as a concern as he argues against the intervention of the Governor General and by extension the Lieutenant Governors in the event of a death of a First Minister: "I assert that it is no longer acceptable in Canada for the Governor General to exercise discretion in the selection of a Prime Minister, even, or perhaps especially, in time of crisis."[310] Dodek's argument is specific to the role of the Governor General with regard to the Prime minister, but equally applicable to the Lieutenant Governors and Premiers as well. The first element of his argument is that vice-regals are bound by convention and any intervention would require the Governor General breaking convention of acting only on the advice of members of a ministry that command the seats in the House of Commons. Dodek also argues that there is a lack of relevant precedents: "historical precedents are no longer applicable to modern Canada because the Governor General no longer wields the power that the position had in the 1890s."[311] Dodek also cites the royal prerogative as no longer being sufficient in allowing for the Governor General to appoint a Prime Minister. Dodek even goes so far as to imply that the prerogative power is an anachronism in the Commonwealth.

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[308] Dodek, Adam. "Rediscovering the Constitutional Law: Succession Upon the Death of the Prime Minister" University of New Brunswick Law Journal 2000. p. 36

[309] Schindeler, Fred. "The Prime Minister and the Cabinet: History and Development. " From Thomas A Hockin (ed.) Apex of Power: The Prime Minister and Political Leadership in Canada 2nd Edition. Prentice: Scarborough, 1977. p. 23

[310] Dodek, Adam. "Rediscovering the Constitutional Law: Succession Upon the Death of the Prime Minister" University of New Brunswick Law Journal 2000. p. 35

Dodek instead views political parties as being better suited to appoint a first minister than vice-regals. There is some evidence to support this, as Rand Dyck notes, "In 1959 and 1960, after the deaths of premiers Duplessis and Sauvé, the Union Nationale cabinet and caucus quickly recommended successors to the deceased party leaders, removing any danger of leaving the decision to the Lieutenant Governor."[312] However, in the event of a need to appoint a first minister political parties would not be able to respond expediently as typically leadership conventions last months. Depending on the circumstance that requires a new first minister, a scandal for example, a political party may not have the legitimacy to choose the next first minister. For instance, if members of the party executive or cabinet ministers were implicated in a scandal the party might propose an implicated cabinet minister as leader. The implicated party having betrayed the public trust should not be given a blank check in choosing the next first minister. The vice-regal official must also keep in mind that the opposition might be in a position, perhaps a better one, to form the government. Nothing in the Constitution provides that a political party can overrule the Governor General.

While Dodek does raise interesting points, they are not as valid as the traditional argument and view that has supported the role of the Governor General and the

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[311] Ibid.

[312] Dyck, Rand. Provincial Politics in Canada: Towards The Turn of the Century. Prentice Hall Canada: Scarborough, 1996. p. 238

Lieutenant Governors in appointing a first minister. Professor Mallory and Norman Ward have been the most forceful academics in arguing the role and discretion of the Governor General in appointing a new Prime Minister. Mallory argues that, "the governor acts on his own authority and with complete freedom in finding a Prime Minister who can govern and who is capable of claiming the allegiance of a body of disciplined followers within the legislature."[313] He also argues: "The right and the duty to find a Prime Minister if that office becomes vacant is the most important single function of the Governor General."[314] J.R Mallory continues to argue the importance of the Governor General in the appointment of the Prime Minister,

> ...we should not forget that the office of sovereign Governor General, and Lieutenant Governor still perform important, though intermittent roles. In a Constitutional Crisis caused, for example, by the death of a first minister, finding and conferring legitimate authority on a successor is a duty so appropriate to a head of state that such a presidential role is common in most Constitutional regimes. [315]

Norman Ward has argued that,

> A sudden death or resignation or party dissention may cause the office of the prime minister to fall unexpectedly vacant and someone must be charged with the duty of seeing that it is filled immediately and to the satisfaction of the Commons. It is the governor's task to take the initiative and pursue the matter unceasingly until a new prime minister is in office.[316]

Similarly, R.M Purnett echoes Mallory while providing another instance that would require intervention of the Governor General,

> Problems could arise, of course, in a crisis situation, caused perhaps by the sudden death of the Prime Minister, or by a cabinet revolt. In such a situation a temporary Prime Minister might have to be found to serve until the Government party could organize a national Convention to select a new leader. In such a crisis

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[313] Mallory, J.R. "The Royal Prerogative in Canada: The Selection of Successors to Mr. Duplessis and Mr. Sauvé" (1960) 26 Canadian Journal of Economy and Political Science p. 314.

[314] Mallory, J.R. The Structure of Canadian Government. rev. ed. Toronto: Gage Publications, 1984 p. 49-50

[315] Mallory, J.R. "The Continuing Evolution of Canadian Constitutionalism" from Cairns, Alan & Williams, Cynthia. Constitutionalism, Citizenship and Society in Canada. Royal Commission on the Economic Union and Development Prospects for Canada. Vol. 33. University of Toronto Press: Toronto, 1985. p. 62

[316] Ward, Norman. Dawson's The Government of Canada, 6th ed. University of Toronto Press: Toronto, 1987. p. 183.

> the Governor General might be involved in the selection process in more than a formal capacity.[317]

Dodek perhaps fails to realize that there was a precedent for the death of a Prime Minister in modern times, as this occurred in Australia in December 1967. As Paul Henderson has noted, "following the disappearance of Harold Holt, it was the duty of the Governor General, Lord Casey, to appoint an inter-regnum Prime Minister to carry out the duties of office until such time as the Liberal party elected a successor."[318] This was not without controversy. Lord Casey had commissioned John McEwen, the leader of the Country Party, who had served as Holt's deputy Prime Minister as the new Prime Minister, rather than the Deputy Leader of the Liberal Party William McMahon.[319] The Liberals and the Country Party had a coalition government, with the Liberals serving as the senior party since they possessed more seats than their County Party allies did.

Many observers, especially those in the Liberal Party, thought that the new choice in Prime Minister should reflect the seniority of the Liberal Party in the coalition. The Governor General perhaps thinking that since the people had chosen Holt as Prime Minister, he should then chose the person in whom Holt had confidence as Deputy Prime Minister. However, this situation simply demonstrates that the discretion of the Governor General is above that of the party in power. Therefore, until clear changes are made to statute or constitution, it must be assumed that the Governor General or Lieutenant Governor will play an integral role in first ministerial succession.

K. Reservation, Disallowance and Refusal of Royal Assent

One discussion with respect to the powers of the Governor General and the Lieutenant Governors has been that of reservation, which is also subject to convention. Let us remember, Section 55 of the *Constitution Act*, 1867, allows the Governor General to withhold Royal Assent of a bill that has passed both the Senate and the House of Commons and Section 56 allows bills to be disallowed by the Governor General.

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[317] Punnett, R.M. The Prime Minister in Canadian Government and Politics. Macmillan Company of Canada: Toronto, 1977. p 33-34

[318] Henderson, Paul. Parliament and Politics in Australia: Political Institutions and Foreign Relations 4th Edition. Heinemann Educational Australia: Richmond, 1987. p. 86

[319] Ibid.

According to some scholars like Hogg, "…the imperial conference of 1930 resolved that the powers of reservation and disallowance must never be exercised."[320] Frank Mackinnon has similarly argued that any refusal of Royal Assent by vice-regals is, "clearly incompatible with the principles of responsible government."[321] An argument could be made that the powers of reservation had been nearly inoperative at the federal level between Confederation and the issuance of new *Letters Patent* in 1878, when new instructions was given by the Imperial government in Britain on the use of reservation. Prior to this time, some 21 bills were reserved and six bills were outright refused Royal Assent.[322] Since 1878, there was only one instance of intervention by the Governor General with respect to the Federal Parliament and this was a reservation.[323] Peter J. T O'Hearn has found that while "Section 55 of the B.N.A Act purports to give the Governor General power, in his discretion, to disallow or serve a bill, but since 1930 it has not been doubted that this is a dead letter, that the Imperial government has no function in respect to Canadian legislation."[324] It is clear that reservation of federal legislation for the pleasure of the Canadian monarch is limited by convention. However, as a matter of law a Governor General could reserve legislation for the pleasure or review of the Canadian monarch.

Alan Tupper has held that reservation at the provincial level is inoperative. Ken Munro has paraphrased Tupper, noting that, "the Lieutenant Governor does have the legal right under the constitution to refuse Royal Assent even if the Premier advises her to sign, yet this aspect of the constitution had become inoperative in modern times, especially when the Premier is supported by a majority of the Assembly."[325] The courts have supported the claims made by Munro and Tupper. In *Re Resolution to Amend the Constitution* [1981] 1 S.C.R 753, it was argued that "reservation and disallowance of provincial legislation, although in law still open, have, to all intents and purposes, fallen into disuse."[326]This ruling was confirmed in the *Queen v. Beauregard* [1986] 2 S.C.R 56, the court finding also that reservation had fallen into "disuse."[327] Some scholars such as Mallory have argued that reservation can still be used in the event that legislation would violate civil liberties.[328] The issue of reservation at both the federal and provincial levels in Canada appears to be inoperative, although a more interesting power still in effect is that of disallowance and the refusal of Royal Assent. However, recent events in Australia do suggest that reservation is not dead in the Commonwealth. In June 2006, the Governor General of Australia reserved civil union legislation, which provided for gay marriage. This case study will be elaborated later on. If reservation is not dead in the Commonwealth, than arguably it is not dead in the Canada.

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[320] Hogg, Peter. Constitutional Law of Canada 3rd Edition. Toronto: Carswell, 1992. p. 243

[321] Mackinnon, Frank. The Government of Prince Edward Island. University of Toronto Press: Toronto, 1951. p. 243

[322] Bourinot, Parliamentary Procedure and Practice (2nd ed) p. 648-650.

[323] Smith, David E. The Invisible Crown: The First Principle of Canadian Government. University of Toronto Press, Toronto, 1995. p. 43

[324] O'Hearn, Peter J. T_Q.C Peace, Order and Good Government: A New Constitution for Canada. The Macmillan Company of Canada: Toronto, 1964. p. 100

[325] Munro, Ken. The Maple Crown in Alberta: The Office of Lieutenant Governor 1905-2005. Trafford: Victoria, 2005. p. 94

Norman Ward has presented an argument that the need for disallowance has been replaced, "some of the main reasons that might have been adduced to activate the disallowance power before 1982 seem to have been largely dissipated by the Charter."[329]However, the most authoritative adjudicator of Canada's written Constitutional law, the Supreme Court of Canada, noted in *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3), [1981] 1 SCR 753*,

> As a matter of law, the Queen, or the Governor General or the Lieutenant Governor could refuse assent to every bill passed by both Houses of Parliament or by a Legislative Assembly as the case may be [even though this would violate convention]…And if this particular convention was violated and assent was improperly withheld, the Courts would be bound to enforce the law, not the convention. [25]

As such, the power is still subsisting in a legal sense. Vice-regals should thus resolve to exercise caution when a bill comes across their desk. They should refuse assent to legislation that is clearly: *ultra vires*, or outside the Constitutional authority of the Legislature (including violating the *Charter of Rights and Freedoms*), or if it violates

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[326] *Re Resolution to Amend the Constitution* [1981] 1 S.C.R 753 as noted in House of Commons debates http://www.parl.gc.ca/38/1/parlbus/chambus/house/debates/057_2005-02-15/HAN057-E.htm
[327] *Queen v. Beauregard* [1986] 2 S.C.R 56 p. 21
[328]Hogg, Peter. Constitutional Law of Canada 3rd Edition. Toronto: Carswell, 1992. p. 112
[329]Ward, Norman. Dawson's The Government of Canada 6th Edition. University of Toronto Press: Toronto, 1986. p. 226

Constitutional convention, violates minority rights, or it is clear that there is no public support for the measure or is extremely detrimental to the public interest. They should not sign any such legislation all the while hoping that the courts will eventually strike the legislation down. This is redundant. Vice-regals are presented with a clear Constitutional mandate to vouchsafe the Canadian Confederation, hence their exhaustive powers. As well, court decisions, especially the Supreme Court variety, take considerable time and therefore the courts may not be able to respond in a timely period. Vice-regal refusal of assent is required when a government has lost the confidence of the House or no longer possesses any legitimacy. If a first minister is demonstrating mental instability and proposed legislation is reflective of such behaviour, there is a clear need to refuse assent and even dismiss the ministry.

In the event that a Lieutenant Governor or Governor General refuses Royal Assent the successor to either of those posts cannot simply confer Royal Assent. As noted by the Prince Edward Island Supreme Court on December 13, 1948 in Gallant v. The King,

> While by a combination of ss. 55 and 90 of the B.N.A. Act, a Lieutenant Governor may withhold the Sovereign's assent to a Bill presented by the Legislature there is no provision in the Act for re-consideration of a withheld assent. In such case the Lieutenant Governor is functus officio, at least until the Bill is again presented. Thus the Royal Assent having been withheld from the Cullen Amendment, 1945 (P.E.I.), c. 26, to the Prohibition Act, 1937, (P.E.I.) c. 27 and no fresh presentation having been made, the amendment never received the Royal Assent and never became law despite the purported Royal Assent by the Lieutenant Governor's successor several months after the prorogation of the Legislature.[330]

Clearly, decisions made by vice-regals cannot simply be overruled.

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[330] Gallant v. The King [1949] 2 D.L.R. 425 Prince Edward Island Supreme Court Campbell C.J. December 13, 1948 at introduction

L. The Royal Prerogative of Mercy

The Government of Canada has noted that the "The Royal Prerogative of Mercy is based on the concept that the sovereign is the fountainhead of justice and as such has the right to intervene when the fallibility of human institutions has produced a condition of hardship or inequity."[331] With respects to pardons, the judiciary in Canada plays no major role,

> Where the courts are unable to provide an appropriate remedy in cases that the executive sees as unjust imprisonment, the executive is permitted to dispense "mercy", and order the release of the offender. The royal prerogative of mercy is the only potential remedy for persons who have exhausted their rights of appeal and are unable to show that their sentence fails to accord with the Charter.[332]

In 2001, Robert Latimer appealed to the federal cabinet to reduce his sentence. Latimer, a Saskatchewan farmer, killed his daughter Tracey who was seriously ill with cerebral palsy. Edward Greenspan a member of Latimer's legal team noted, "I intend to go to Cabinet…It's rare as rare can be, but they've done it. I take great comfort in it."[333] Latimer would apply for clemency under s.748 of the Criminal Code of Canada, which would provide a free or conditional pardon. The request was denied. This outcome was despite considerable public support including a petition that contained 60,000 names advocating his release. The Latimer case study illustrates just how rarely the power is used.

Under the s. 748 (2) and (3) of the Criminal Code of Canada, "The Governor in Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence."[334] As well, "Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted."[335] Under s. 748.1 (1), "The Governor-in-Council may order the remission, in whole or in part, of a fine or forfeiture imposed under an Act of Parliament, whoever the person may be to whom it is payable or however it may be recoverable."[336] Section 749 takes care to mentions that, "Nothing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy."[337]

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[331] Peritz, Ingrid. "Very few Canadians get a royal pardon: [FINAL Edition]"The Gazette Montreal, Que.: Mar 31, 1990. p. A8

[332] R. *v.* Sarson, [1996] 2 S.C.R. 223 John Alexander Sarson *Appellant v.*Her Majesty The Queen *Respondent* Indexed as: R. *v.* Sarson File No.: 24233.1996: February 22; 1996: May 30. Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. on appeal from the court of appeal for Ontario. p. 30

[333] Chwialkowska, Luiza. "Greenspan plans to ask for royal prerogative: New bid to cut sentence; "[National Edition]. National Post. Don Mills, Ont.: Jan 19, 2001. p. A.4

The Governor-General can grant clemency unilaterally and without the Governor-in-Council. Under Article XII of the *Letters Patent*, 1947 the Governor General may grant a pardon. In fact, "the Governor General has broader powers than are available to cabinet under s. 748 of the Criminal Code."[338]It is possible that an individual seeking a pardon with the federal cabinet and finding himself or herself denied by the federal government, could also appeal to the Governor General. However, this method is even rarer than normal grants of clemency under s. 748 of the Criminal Code. As the National Parole Website has detailed, "The Governor General can grant free and conditional pardons, and remission of fine, forfeiture and pecuniary penalty. However, the Governor General authority to grant clemency will be used only when it is not possible to proceed under the Criminal Code", or unless the Governor General deems it necessary to do so.[339] The National Parole Board has noted other forms of clemency given by the Governor General, who may grant the following:

> Remission of sentence: all or part of the sentence erased. Respite: interruption in the execution of the sentence (e.g. for a major surgery). Relief from prohibition: alteration or removal of prohibition (e.g. prohibited from driving).[340]

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[334] R.S., 1985, c. C-46, s. 748; 1992, c. 22, s. 12; 1995, c. 22, s. 6.
[335] Ibid.
[336] Ibid.
[337] Ibid.
[338] http://www.justice.gc.ca/en/news/nr/1997/rtrpm.html
[339] http://www.npb-cnlc.gc.ca/infocntr/factsh/royal_pre.htm
[340] Ibid.

John Vandoremalen, a National Parole Board spokesperson, spoke of the Prerogative of Mercy: "It's the power of kings, and queens, and emperor to shorten sentences, commute sentences, or release someone from prison who wasn't guilty."[341]

Lieutenant Governors prior to Confederation were able to exercise the royal prerogative of mercy. However, this power was transferred to the Governor General with Confederation. This was not without debate, however. The Quebec Resolutions had stipulated that the prerogative of pardon "which belongs to the right of the Crown, shall be administered by the Lieutenant Governor of each Province in Council."[342] The Governor General argued against this provision and stated he would not support it, noting it gave, "the highest exercise of the Royal Prerogative to the charge of officials, not even appointed by Her Majesty."[343]The Colonial Secretary Edward Cardwell held that, "With respect to the exercise of the Prerogative of Pardon it appears to Her Majesty's government that this duty belongs to the Representative of the Crown and could not with propriety be devolved upon the Lieutenant Governors."[344] Some two years later, when the *Constitution Act* was being drafted in London, Macdonald and the rest of the Canadian delegation "pressed very strongly all the arguments in favour of conferring the power to Lieutenant Governors."[345]Despite this, the Imperial government refused to acquiesce to the Canadian appeals. The Canadian desire that Lieutenant Governors be given the royal prerogative of mercy could perhaps be linked to the fact that the Lieutenant Governor was at that point viewed not only a representative of the Sovereign but as a Dominion Officer. A Dominion Officer would be subject to influence by the federal cabinet and the Prime Minister, to the point where the position could be considered an agent of the Cabinet, whereas the early Governors General were not. Consequently, after Confederation and with the granting of responsible government, the power of the Lieutenant Governor to pardon would have vicariously been a power of the

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[341] Chwialkowska, Luiza. Greenspan plans to ask for royal prerogative: New bid to cut sentence; [National Edition]. National Post. Don Mills, Ont.: Jan 19, 2001. p. A.4

[342] Beck, J.M. The Shaping of Canadian Federalism: Central Authority or Provincial Right? Copp Clark Publishing: Toronto, 1971p. 67

[343] Ibid.

[344] Ibid.

[345] Ibid p. 62

Prime Minister and the Cabinet. In contrast, the pardoning power of the Governor General was subject to influence to the Imperial government.

M. Removal of a Governor General

There is some debate over whether a Governor General may be removed on the advice of the Prime Minister. Ed Schreyer did note that it would be possible for a Governor General to be dismissed should he or she act improperly:

> But here's the crutch and this might even sound silly to you. But if a Governor General acts unwisely and dismisses the government okay and then obviously what has to happen next eventually is an election at some point fairly soon thereafter, it might be a month, it might even be a year: maybe he can cobble together an alternative government like we did in Canada in 1926 it didn't last very long. Okay. Either way though if the Governor General acts unfairly and unwisely you can be sure that if the government that he acted against wins re-election that Governor General's position becomes untenable and he would have to either resign or the Queen would have to remove his commission.[346]

There is no provision binding the Canadian monarch to approve a call by a Prime Minister to dismiss a Governor General. As noted by J.R Mallory, "There was, however, nothing in the Resolutions of the Imperial Conference of 1926 and 1930, or elsewhere, which gave Dominion Ministers the Constitutional right to advise the King to get rid of a Governor General of whom they disapproved."[347] In a dispute between a Governor General and a Prime Minister, a Prime Minister may desire to remove the Governor General. However, in such a situation the Governor General is likely to remove the commission of the Prime Minister rendering it impossible for the former Prime Minister to advice the Queen to remove the Governor General. Such a circumstance is not academic, as this motivation was clear in the Whitlam dismissal, which will be elaborated on in greater in depth. In a conflict between the Governor General and the Prime Minister, a Prime Minister could seek to pre-empt his dismissal by contacting Her Majesty to remove the Governor General. However, as Geoffrey Marshall notes,

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[346] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

[347] Mallory, J.R. "The Appointment of the Governor-General: Responsible Government, Autonomy, and the Royal Prerogative. " The Canadian Journal of Economics and Political Science, Vol. 26, No. 1 February 1960. p. 104

> The only power and authority not conferred on the Governor General in respect of Canada would, therefore, seem to be in the Queens' power as Queen of Canada to appoint and remove the Governors General (together with the power to revoke the *Letters Patent*). Even stronger grounds exist, therefore, in Canada than in Australia for resisting any appeal for the Royal intervention to reverse a decision of the Governor General that brings him into conflict with his Ministers.[348]

Any action that would require the removal of the Governor General would have to be with cause and be a result of serious indiscretion on the part of the Governor General.

N. Role of the Deputy Governor General

In 1999, in *Tunda c. Canada,* the authority of a Deputy Governor General to confer Royal Assent was challenged in the Federal Court of Canada. The Plaintiff correctly noted that Chapter 15 of the 1995 Canada Statutes and the *Constitution Act*, 1985, were assented to by two Deputy *Governors General* respectively John Sopinka and the Rt. Hon. Brian Dickson, who served as Chief Justice of Canada from 1984 to 1990. The Plaintiff argued that those assents did not have full legal force as in granting Royal Assent the judges violated Section. 55 of the *Judges Act* which states, "No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties."[349]The initial application was dismissed. The applicant appealed charging that the necessary laws under which he was changed with were *ultra vires*. The court submitted that,

> [TRANSLATION] Under ss. 14 and 15 of the *Constitution Act, 1867*, can the Governor General appoint judges of the Supreme Court who will act on his behalf and give them his powers, attributes and duties, including the right to give the Royal Assent? Must be answered in the affirmative. A distinction must be made between, on the one hand, the power and, on the other, the desirability for the Governor General to make such appointments, as Deputy Governor General, specifically with reference to the power conferred on Supreme Court judges to give Royal Assent to statutes which this Court, and the judges who approved them, may be required to consider for their Constitutional validity. We can understand that this kind of delegation of the Governor General's powers may

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[348] Marshall, Geoffrey. Constitutional Conventions: The Rules and Forms of Political Accountability. Clarendon Press: Oxford, 1984. p. 176-177
[349] http://lois.justice.gc.ca/en/J-1/text.html

> raise a question of desirability and may prompt doubts in the minds of certain people in a context of separation of powers (see this Court's judgment in *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 (Fed. C.A.), at 210), but it is nonetheless legal.[350]

The granting of Royal Assent by a Deputy Governor General is extremely frequent. As Beauchesne's Parliamentary Rules and Forms notes "The Royal Assent is rarely given by the Governor General in person. This role is usually performed by a Justice of the Supreme Court acting on behalf of the Governor General."[351]

O. Preliminary Conclusions

Chapter V outlined the role of the vice-regals in Canada. Given the broad legal powers afforded to Canada's vice-regals along with their being vested with the Royal Prerogatives, it is essential to view part of the vice-regal job description as being the last guardian of the constitution. Vice-regals act as the ultimate guardian, as for example, they ensure that Prime Ministers do not become tyrannical and that the rule of law and the constitution are properly followed. The ability of vice-regals to act as Constitutional guardians cannot be hindered by the courts. Courts have the ability to provide advice, not compel vice-regals to perform a task.

Further justification for vice-regals acting as last guardians of the constitution comes with their perennial possession of the Royal Prerogatives. The Royal Prerogatives cannot fall into disuse, the have not been divested to the elected executives, they are not largely subject to judicial review. The Royal Prerogatives provide for vice-regal emergency and reserve powers, which allow these officials to refuse or force a dissolution, dismiss first ministers, and appoint first ministers. The royal prerogative of mercy allows the Governor General to pardon any crime committed in Canada

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[350] Tunda c. Canada (Ministre de la Citoyenneté & de l'Immigration)Kassongo Tunda (alias Kizuzi Dibayula), Appellant (Plaintiff in Trial Division)and The Minister of Citizenship and Immigration, Respondent (Defendant in Trial Division) Federal Court of Appeal Décary, Létourneau, Noël JJ.A. Heard: May 14, 2001Oral reasons: May 14, 2001Docket: A-651-99 p. 4

[351] Fraser, Alistair & Birch, G.A & Dawson, W.F. Beauchesne's Rules and Forms of the House of Commons of Canada. Toronto: Carswell Company, 1978. p. 241

Chapter VI. Governors General in Canada: some Precedents of Intervention

Throughout Canada's history, there have been instances of intervention by Governors General and Lieutenant Governors. However, rather than dwelling on a historical examination that spans back to Confederation or even past this period, emphasis will be placed on a more modern era. The studying of the contemporary relevance of the vice-regal offices requires an examination of precedents since the infamous Byng-King dispute of 1926. This dispute represents a major hallmark in the relevant literature as it was the moment when convention began to restrict the political actions of the Governor General. This will also be a suitable guide for further discussion.

A. Byng Re-Examined

The Lord Byng-Mackenzie King conflict in 1926 was one of the most contentious in Canadian political history. This historical event is debated even in contemporary times from different and often diametrically opposed camps. One camp supports the actions of Lord Byng others argue against the actions made by him. Scholars such as A. Berriedale Keith, H Blair Neatby, John S. Ewart, Herbert V Evatt and R. MacGregor Dawson have argued against the actions of Governor General Lord Byng.

Berriedale Keith argued that, "Lord Byng, in refusing the dissolution of Parliament advised by Rt. Hon. Mackenzie King…has relegated Canada decisively to the colonial status which we believed she had outgrown."[352]H. Blair Neatby argued, "Lord Byng…was more concerned with being fair to Meighen than with protecting the democratic basis of the constitution. In refusing King's advice he made the right decision for the wrong reasons."[353]R. MacGregor Dawson argued that, "…the refusal of Lord Byng to accept the counsel of his principal adviser was reactionary and open to severe condemnation. [It] was definitely antagonistic to the modern trend of the Dominion self-government."[354] Herbert V. Evatt has argued that, "…Lord Byng should have refused Mr. Meighen's request for a dissolution, and recommissioned Mr. King as Prime

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[352] Graham, Roger. The King-Byng Affair, 1926: A Question of Responsible Government. The Copp Clark Publishing Company: Toronto, 1967. p. 7

[353] Ibid.

[354] Ibid.

Minister…being reasonably certain that Mr. King would repeat his former tender of advice, upon which a dissolution would ensue."[355]

However, the opposing camp has a more compelling argument. As Eugene Forsey wrote: "I was also in the House when the King government was defeated in the small hours of June 26, and I was sitting behind Mrs. Meighen when Meighen's confidential messenger brought the news that Mr. King had asked the governor-general, Lord Byng, to dissolve Parliament and that he had refused. I had not, even then, the slightest doubt that Lord Byng's refusal of Mr. King's request for a dissolution of Parliament was completely Constitutional, and indeed essential to the preservation of Parliamentary government."[356] Mallory has argued, "Lord Byng's statement of his position is clearly literally correct."[357] While one could cite further from Forsey, Ward and Mallory, among other Constitutional scholars, it is perhaps more helpful to cite the opinions of Governors General and other relevant political actors on the Byng-King dispute.

Andrew Heard has noted that in order for a convention to be a convention it requires adherence and the belief by actors it binds that this represents a strong and legitimate limitation or practice of the office. To demonstrate the inapplicability of the Byng-King convention it is appropriate to canvass many political actors, including the Governor General, on their opinions of what happened and whether they felt bound by it. After all the opinion of the Governors General that are more relevant and applicable than the one of political theorists. In 1926, one observer of the Byng-King dispute noted of the situation,

> A Governor General has the absolute right of granting or of refusing a dissolution. A decision to refuse is a very dangerous one as it embodies the rejection of the advice of [the] accredited Minister, which is the bedrock of Constitutional government. Therefore, in nine cases out of ten a Governor General should take the advice of the Prime Minister on this as on other matters. But if the Governor

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[355] Ibid.

[356] Young, Christopher. " Forsey was unerring guide; knew the ways through constitutional quagmire. " The Gazette. Montreal. February 22, 1991 p. B.3

[357] J.R. Mallory, The Structure of Canadian Government, rev ed. Toronto: Gage Publications, 1984 p. 55

> General considers the advice offered to be wrong and unfair and not for the welfare of the people it behoves him to act in what he considers the best interest of the country.[358]

The observer was in fact the Governor General Lord Byng. The quote was demonstrative not of an arrogant foreign interloper (as subsequently portrayed by Mackenzie King), but of someone who realized the importance of his office and the importance of the fundamentals of "Constitutional government."[359]

Vincent Massey, Canada's first native born Governor General since Confederation would confess that at the time of the Byng-King debate, he was motivated by partisan interests, but this did not transcend the injustice perpetuated by the Liberal Party against the Governor General,

> But as a practising politician and a loyal supporter of my party [Mackenzie King's Liberals], I naturally sought, along with its leader, to turn the Constitutional issue into which Lord Byng had been drawn to our political advantage, if this could be done without discrediting either Lord Byng personally or the office he occupied. I was concerned that in the heat of the election campaign, the issue might not be handled by our speakers with as much tact and delicacy as it seemed to me to require.[360]

Massey would candidly declare though that Lord Byng had acted appropriately, "I did not know at the time that Mackenzie King had privately requested the Governor General to consult the Government in London, a request that Lord Byng quite properly refused."[361] Ed Schreyer would note of the Byng-King episode,

> [Byng] He was completely justified in my opinion…Mackenzie got away with it because he attacked the Governor General… that's why Mackenzie King got away with it but he was quite wrong, in my opinion the Governor General was quite right. After all, what did he do the Governor General if not simply say to the Prime Minister: "Look you were asking for a dissolution because you've lost the vote in the House of Commons, but it's only been a few months since the last election and I feel that it is common sense." I am not paraphrasing I'm not

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[358] Courtney, John C. "The Defeat of Clark Government: The Dissolution of Parliament, Leadership Conventions and the Calling of Elections in Canada. " Journal of Canadian Studies. Summer 1982 Vol. 17, No. 2 p. 82

[359] Ibid.

[360] Massey, Vincent. What's Past is Prologue. The Macmillan Company: Toronto, 1963. p. 103-4

[361] Ibid.

> quoting, but I can just see the scenario as the Governor General must have said the common sense tells me that I should canvass the possibility of asking the leader of His Majesty's Opposition to form a government which is exactly what he did.[362]

Similarly, some Prime Ministers have shared similar views on the actions of Governor General Lord Byng. John Diefenbaker recounted the Byng-King crisis as such,

> Mackenzie King then produced one of the most transparent falsehoods of any made in any generation of our country. He claimed that Canada was in the midst of a Constitutional Crisis, that the Governor General, Lord Byng, had acted on instructions from Downing Street inviting Meighen to form a government, and that he, Mackenzie King, would save the common people of our nation from colonial peril. King's "challenge of imperialism" was so phoney it made Barnum look like an amateur. There was no substance in it, either in law or logic.[363]

Eugene Forsey has demonstrated that another Prime Minister would not dismiss the right of the Governor General to refuse dissolution, "It is often glibly asserted that King's victory in 1926 destroyed the reserve power of the Crown in Canada. But King was very careful to say, repeatedly, that there could be circumstances in which the Governor General would be justified in refusing dissolution."[364] Presumably, King was only against the right when it went against his own interests. Forgotten has been the fact that the Byng-King dispute was the matter of partisanship and politics. If Meighen and King had their roles reversed in 1926, King would have been quite content to see Meighen have his request for dissolution refused. King would have probably applauded Lord Byng for his protection of the Canadian Constitution.

If several Governors-General and Prime Ministers do not believe in the so-called conventions that arose out of the Byng-King debate it is clear they are not effective conventions. This also discounts the myth that is prevalent in Canadian politics that the Byng-King episode radically altered the ability of the Governor General to intervene. Ironically, one of the most agreed upon instances among contemporary scholars of vice-regal intervention comes when a first minister has lost the confidence of the House. After this occurs, the advice of the Prime Minister is almost meaningless. At the time of the crisis, King's government was rapidly heading toward a call of censure, which would have perhaps led to a call of non-confidence. King merely attempted to sabotage the democratic process and Prime Ministerial accountability to the House of Commons.

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[362] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

[363] Diefenbaker, John. One Canada Memoirs of the Right Honourable John G. Diefenbaker: The Crusading Years 1895-1956. Macmillan of Canada: Toronto, 1975. p. 147-48

[364] Forsey, Eugene. "The Problem of 'Minority Government' in Canada. Canadian Journal of Economics and Political Science. vol. 30 no.1 February 1964. p. 5

A contemporary juxtaposition that might prove helpful was the Sponsorship Scandal that came to light in the early 2000's. Would it have been acceptable for the Liberal government to ignore calls for an investigation and instead decided to call an election with the public not aware of the facts? What if the Liberals had attempted to hide the Auditor Generals report? What if the Liberals had attempted to blame all political parties as being complicit in the scandal like King had? Why then is the situation surrounding Mackenzie King be viewed as anything different?

While the facts of the Byng-King dispute to do not need to reiterated, some key elements of the dispute require clarification. Mackenzie King argued that Lord Byng was prejudiced against him and inappropriately supported Arthur Meighen. However, it is clear that Arthur Meighen did not agree with this statement, especially after the 1925 election. In a letter to the President of the Prince Albert Conservative Association, P. W. Pennefather, Meighen noted,

> What strikes me as utterly insufferable about the present situation is this: a Government defeated at the polls comes to Parliament and through the mouth of a Minister declares that it does not ask for confidence and continuation in office on the basis of its past record, but that is offers a series of new promises of future conduct fulfillable at the expense of the Public Treasury to a small group of Progressives and ask these progressives on the face of such promises to maintain it in power…This is a shameless, brutal assault not only on the most sacred principles of British Constitutional government but on common honesty.[365]

Clearly, Meighen was upset at not being the Prime Minister. However, the appointment of the Prime Minister is the discretion of the Governor General.

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[365] Diefenbaker, John. One Canada Memoirs of the Right Honourable John G. Diefenbaker: The Crusading Years 1895-1956. Macmillan of Canada: Toronto, 1975. p. 145

Mackenzie King would later accuse the Governor General and the Imperial Government of collusion. However, it is clear that Mackenzie King had actually encouraged Lord Byng to seek the advice of the Imperial Government, particularly the advice of the Colonial Secretary Lord L.S Amery, "…my action [in advising Lord Byng to consult Mr. Amery]…was a chivalrous action intended to prevent the Governor General from making the mistake which he did make."[366] Lord Byng seeing this as quite an obvious trap refused. Lord Amery would later congratulate Byng on this course of action, "…it was no less wise than courageous of you to refuse flatly Mackenzie King's preposterous suggestion that you should cable me for advice or instructions."[367]Mackenzie had purported foreign interference when there was clearly none.

Byng's choice of Meighen as Prime Minister has been questioned, especially since his government fell so quickly. However, the defeat of the Meighen government was, as Edward McWhinney notes, was conducted under rather dubious circumstances,

> When a previously accepted pairing of a Conservative and a Liberal MP was in fact breached in the actual House vote, King was able to defeat the Meighen government by a single vote. The deciding vote turned on the fortuitous presence of the Liberal MP who had earlier accepted "pairing" with an absent Conservative MP. According to all the rules of the Parliamentary game, this should have cancelled out both votes.[368]

As Norman Ward explains, the Meighen cabinet was hampered from the very start.[369] Meighen should have anticipated the tomfoolery of Mackenzie King. Meighen should have sought a brief recess for the session to regroup his forces. Instead, Meighen proceeded with a cabinet comprised of acting ministers, which King convinced the House of Commons was illegal.[370]

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[366] Graham, Roger. The King-Byng Affair, 1926: A Question of Responsible Government. The Copp Clark Publishing Company: Toronto, 1967. p. 6

[367] Ibid

[368] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005. p. 99

[369] Ward, Norman. Dawson's The Government of Canada 6th Edition. University of Toronto Press: Toronto, 1986. p. 106

[370] Ibid.

The re-examination of the Byng-King dispute clearly vindicates the Governor General. As Norman Ward has said: "In the Byng dispute the Governor General won but an empty victory, for the consequence were to the detriment of the long-run powers of the office. Not only did the prime minister, Mackenzie King, win the general election which automatically ensued; he was also free to interpret his results to support his own views," as did the Liberal Party of Canada.[371]

B. Roland Michener

The fall of Pearson

Peter Stursberg has written that, "There were some serious crises during Michener's term of office as Governor General, one or two which brought visions or nightmares of a place in history beside Lord Byng."[372] The first came on February 19, 1968, just a year into Michener's term, when the Pearson government was defeated on a money bill. The defeat had come as a surprise as the Conservatives, despite the minority status of the Liberals, did not have the necessary numbers in normal circumstances to defeat the government. However, Pearson had earlier announced in the year his resignation and many cabinet ministers were campaigning to succeed him. As a result, many cabinet ministers were skipping their duties in the House. Prime Minister Pearson was also absent from the House having gone to the Caribbean to receive an honorary degree. The vote had also come on a Monday night when attendance is typically low.

At the time, the Governor General was attending the Winter Carnival in Quebec City. The Conservatives were anxious to have an election. Under Constitutional convention, the defeat of the government on a money bill should automatically trigger the resignation of the cabinet or the calling of general elections. However, the Governor General chose not to intervene to enforce either. The vote of confidence was more a fluke than a demonstration of the Conservative ability to command a majority or defeat the government in the House of Commons. Ultimately, this action was at the discretion of the Governor General. Michener postponed his return to Ottawa and instead chose to remain in Quebec until Prime Minister Lester B. Pearson returned. In his mind, Pearson still possessed the confidence of the House of Commons. Pearson pressured the Conservative leader Robert Stanfield not to force the issue. He went so far as to send the Governor of the Bank of Canada to convince the Opposition Leader that the fall of the government on a money bill would damage the Canadian economy.[373] The resolution of this Constitutional Crisis came when Robert Stanfield agreed to let Pearson regroup his forces in the House of Commons and demonstrate that he still possessed its confidence. The resolution of the crisis had arguably two points. The first came with the magnanimous behaviour of Robert Stanfield. The second was the inaction of the Governor General, who in the breach of a Constitutional convention did not even leave Quebec City.

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[371] Ibid. p. 176

[372] Stursberg, Peter. Roland Michener: The Last Viceroy. McCraw-Hill Ryerson: Toronto, 1989. p. 197

The War Measures Act

The invoking of the *War Measures Act* in 1970 resulted in the need for the intervention of the Governor General. The *War Measures Act*, required the consent of the Governor General before implementation, as outlined by Section 2,

> The issue of a proclamation by Her Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or real or apprehended, exists and has existed for any period of time therein stated, and of it continuance, until, by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.[374]

With respect to the FLQ (Front de Libération du Québec) Crisis, Prime Minister Pierre Trudeau kept the Governor General Michener sufficiently informed. With the kidnapping of the British Trade Commissioner James Cross on October 5 and Pierre Laporte on October 10 Trudeau informed the Governor General that he might need to proclaim the *War Measures Act*. Michener's response that, "If you think it's necessary I shall of course, proclaim the act on your advice."[375] The Canadian Security forces were in disarray and unsure of the true strength of the FLQ and the extent to which the crisis was an apprehended insurrection. One of Trudeau's cabinet ministers, Jean Marchand, openly spoke of the FLQ having some 2,000 heavily armed supporters in Montreal alone.[376] On October 16, the Governor General was awakened at 4 am to give assent to the *War Measures Act*. Michener would later recount that, "I looked it over. It seemed to be in order, so I signed it."[377]The early granting of Royal Assent allowed the police to conduct early morning raids. Luckily, the *War Measures Act* was not implemented for long, but even today its implementation remains controversial.

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[373] Ibid. p. 198

[374] *The War Measures Act* R.S., 1952 Chapter 288 s.2

[375] Stursberg, Peter. Roland Michener: The Last Viceroy. McCraw-Hill Ryerson: Toronto, 1989. p. 198

The 1972 Elections

The elections of October 30, 1972 returned one hundred and nine Liberals and one hundred and seven Progressive Conservatives to the House of Commons. The situation was such that Michener did not have to intervene, as Trudeau was able to gain the support of the New Democrats led by David Lewis. Lewis had some 31 Members of Parliament, to support the Liberal government. However, the close result meant that Michener's discretion was far more important. On February 24, 1973 at Roland Michener's last Press Gallery Dinner, he would describe the situation in which he had been placed, "It is axiomatic that the Crown tries never to act politically unless it has someone to take the blame, and so I keep looking around hopefully for an easy way out of every dilemma."[378] Michener also confessed to a "state of jittery indecision" which admittedly was contrary to the need for the Crown to be decisive in such situations. Michener soon realized that with respect to situations that required vice-regal decisions "that I am it."[379]

Michener's role as Governor General included the position of councillor. Pierre Trudeau said in his tribute to Michener at the time of his retirement in 1973, "…I can recall with personal gratitude the many Wednesday nights since 1968 when you have offered me your encouragement and counsel on the nation's business."[380] Lester B. Pearson would also note his appreciation of Michener's counsel. The Lieutenant Governors across Canada would certainly appreciate Michener's counsel as well.

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[376] Ibid.
[377] Ibid.
[378] Stursberg, Peter. Roland Michener: The Last Viceroy. McCraw-Hill Ryerson: Toronto, 1989. p. 200
[379] Ibid.
[380] Matheson, W.A. The Prime Minister and the Cabinet Methunen: Toronto, 1976. p. 10

Michener noted that while Canada's elected political executives met regularly, the Governor General never met with the Lieutenant Governors. As Ken Munro describes,

> Consequently, he began regular consultations with the Lieutenant Governors of Canada. The first of these meetings took place in 1973…At this meeting, they discussed their Constitutional responsibilities as well as they way to discharge their unofficial and ceremonial functions. Michener saw that there were papers and documents prepared for the meeting and that Constitutional authorities came to talk to the group[381]

Since typically Lieutenant Governors have limited resources this gesture ensured that the considerable resources of the Governor General would be at their disposal.

C. Governor General Reform and Constitutional Talks 1978-1982

The 1982 amendment to the Canadian Constitution confirmed the powers of both the Lieutenant Governors and Governor General. J.R Mallory has argued that, "the *Constitution Act*, 1982, has had the incidental effect of closing off serious debate about the head of state. The reason is that the offices of the sovereign, Governor General, and Lieutenant Governor of a province have been firmly entrenched in the Constitution, and any changes relating to them must have, by virtue of Section 41 (a), the unanimous consent of Parliament and all the provincial legislatures."[382]

The lack of changes to the vice-regal offices was not due to ignorance. The Premiers and the Prime Minister knew that alterations were possible to the Office of the Queen, Governor General and Lieutenant Governor. Prime Minister Trudeau had offered as much with *Bill C-60*. Instead, the Premiers reviewed the role of both the Lieutenant Governor and Governor General, knowing that their powers were in full effect. Trudeau's radical suggestions on changes to the Governor General had little support. The Premiers desired to keep the vice-regal positions as they were, as the Hon. Gerald A. Regan Premier of Nova Scotia noted during the 19th Annual Premier's Conference at

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[381] Munro, Ken. The Maple Crown in Alberta: The Office of Lieutenant Governor 1905-2005. Trafford: Victoria, 2005. p. 27-28

[382] Mallory, J.R. "The Continuing Evolution of Canadian Constitutionalism" from Cairns, Alan & Williams, Cynthia. Constitutionalism, Citizenship and Society in Canada. Royal Commission on the Economic Union and Development Prospects for Canada. Vol. 33. University of Toronto Press: Toronto, 1985. p. 51

Regina/Waskesiu during August 9-12, 1978: "If something is working well, then leave it alone."[383] At the same conference many Premiers objected to Trudeau's Bill including the desire to alter the Office of the Queen as well as the Governor General and Lieutenant Governors. The Premier of Ontario, William G. Davis, noted, "…the Governor General now exercises almost every one of the Queen's powers with reference to Canada…The monarch represents a tangible unique symbol within Parliament and the Legislatures which serves to safeguard the principle and the practice of responsible, democratic government, and which ensures an order and stability-not easily described but always present-in our government which many countries wish they had."[384] Davis continued noting, "…the modern monarch stands for all those beliefs we deeply hold, but cannot easily articulate."[385] Richard Hatfield, the Premier of New Brunswick, had concerns that Trudeau's proposed *Bill C-60* would diminish the monarchy, "we add nothing to the cause of Constitutional reform by diminishing the position of the Crown."[386] Instead, he argued, other steps were necessary,

> It may be that we should consider steps to clarify the role of the Governor General and to enhance the Governor General's ability to fully represent the Constitutional Monarchy in Canada. As long as it remains clear that the powers the Governor General exercises are, as they were, vested in the Crown's representative, there would be no basis for serious objection.[387]

Hatfield continued noting that significant changes to the position by the federal government would require full justification.[388] Gerald Reagan, the Premier of Nova Scotia, noted, "The monarchy has worked well for Canada providing Constitutional stability without [gratuitous] intrusive or partisan participation in national debate."[389] As Geoffrey Steven would note of the Premiers Conference, "Listening to the provincial premiers, assembled in their annual conference, which opened yesterday at the University of Regina, one comes quickly to the conclusion that the federal Government made two major mistakes with its Constitutional legislation…one was to tackle institutional changes…the other one was the monarchy."[390]

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[383] Regan, G. A Constitutional Reform - Excerpts of Remarks By the Honourable Gerald A. Regan, Q.C. - Premier of Nova Scotia. 1978. Government of Canada . Premiers' Conference, Regina / Waskesiu, Saskatchewan, August 9-10, 1978 Canada Premiers' Conference Regina / Waskesiu Document 850. 010-015

[384] Davis, William G. "Monarchy: A Statement-Ontario. " Government of Canada. Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, October 30-November 1, 1978

[385] Ibid.

[386] Hatfield, Richard. Statement on the Constitution by the Honourable Hatfield, Richard, Premier of New Brunswick. 1978. Canada. Premier's Conference Canada. Premiers' Conference, Regina/Waskesiu, Saskatchewan, August 9-10, 1978. Canada Premiers' Conference Regina/Waskesiu Document 850. 010-013.

[387] Ibid.

[388] Regan, G. A Constitutional Reform - Excerpts of Remarks By the Honourable Gerald A. Regan, Q.C. - Premier of Nova Scotia. 1978. Government of Canada . Premiers' Conference, Regina / Waskesiu, Saskatchewan, August 9-10, 1978 Canada Premiers' Conference Regina / Waskesiu Document 850. 010-015

Outside the conference, the Premiers were also critical of the proposed reforms to the Office of Governor General. Richard Hatfield noted, "The attitude of *Bill C-60* …demonstrates an unfortunate inability on the part of the proponents of Constitutional reform by diminishing the position of the Crown…One would think it foolhardily to tamper with such institutions, and any proposals for reform which, for no apparent reason, seem to do so, serve only to create doubts as to the worth and purpose of all other proposals."[391]

Eugene Forsey would speak as forceful as Hatfield, and as a Liberal Senator, appointed by Trudeau he would campaign against *Bill C-60*, spreading his message to the Liberal caucus. In very certain terms, Forsey would tell Trudeau, "I want to see the Governor General left alone."[392] Trudeau would respond that course of action was not tenable, "It's either the Governor General becoming more and more the head of state or nothing."[393] Forsey had felt the wording of *Bill C-60* could eventually provide for the ability of the Prime Minister to usurp the role of the Governor General. He theorized that the Prime Minister not the Governor General would eventually become Head of State. As noted in a Globe and Mail editorial on July 27, 1978, "Senator Eugene Forsey, who finds the wording of the draft legislation such as this could be constitutionally possible for a Prime Minister to take on himself the Office of Governor General."[394] Sharing this sentiment some Liberals would view some of the other Constitutional proposals as being autocratic and giving the cabinet "dictatorial powers." Senator Van Roggen noted that, "a potential dictator could grab power by opening Parliament for only a few days of year under the proposed constitution."[395] David Collenette, the MP of York East, "complained that the proposed constitution would permit governments defeated by a non-confidence vote in the Commons to continue operating."[396]

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[389] Hatfield, Richard. Statement on the Constitution by the Honourable Hatfield, Richard, Premier of New Brunswick. 1978. Canada. Premier's Conference Canada. Premiers' Conference, Regina/Waskesiu, Saskatchewan, August 9-10, 1978. Canada Premiers' Conference Regina/Waskesiu Document 850. 010-013.
[390] Stevens, Geoffrey. "Two Major Mistakes. " Globe and Mail. August 10, 1978. p. 6
[391] Ibid,
[392] Stursberg, Peter. Roland Michener: The Last Viceroy. McCraw-Hill Ryerson: Toronto, 1989. p. 184
[393] Ibid.

Trudeau's motives on the vice-regal changes were rightfully questioned. The *Charter of Rights and Freedoms* afforded a new Americanized judicial system. Was his proposal of changes anything less that establishing a President, albeit a 'First Canadian' for Canada? If the 'First Canadian' was elected, albeit in the House of Commons, one might see politicians and even Prime Ministers campaigning for that role. Trudeau's argument that the Governor General needed Constitutional legitimacy was also perhaps disingenuous. Some might argue the Governor General already has Constitutional recognition of his or her contemporary role by the modern *Letters Patent* issued since 1947 onward. These documents are Constitutional documents and no Canadian power save the monarch can revoke or amend them. When the Constitution was patriated in 1982, the ability to amend all Constitutional documents did not come with it. If Trudeau was truly serious about strengthening the role of the Governor General, he did not need to propose elections in the House of Commons or new nomenclature; he merely needed to insert clause by clause the provisions provided by the *Letters Patent* from 1947 onward. While the most important aspect of the *Letters Patent*, 1947 the execution of the Royal Prerogatives by the Governor General was reciprocated in section 42 of *Bill C-60*, "the exercise for her the prerogatives, functions and authority belonging to her in respect of Canada," it became contested due to Trudeau's other proposed changes.[397] No one was exactly certain what Trudeau's vision was and therefore every motive was questioned, especially the changes to executive power (after all this was the man who invoked the

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[394] Editorial. "The Queen returns." Globe and Mail. July 27, 1978

[395] Cp. "Cabinet aims for dictatorial power, Liberal senators, Mp tell committee. " Globe and Mail. August 18, 1978. p. 1

[396] Ibid.

[397] *Bill C-60* Section 42.

War Measures Act). Critics also questioned Trudeau's loyalty to the Crown. As Prime Minister, he had implemented many institutional changes that diminished the visibility of Her Majesty and Canada's monarchical system (as described earlier with respect to RCAF and RCN).

While many believed Trudeau was not to be trusted, others said that Trudeau was loyal to the Queen and was merely trying to strengthen the post of Governor General, by creating the 'First Canadian.' Trudeau attempted to show Canadians that this was in fact his intention. Trudeau presented correspondence to the media between his government and Her Majesty that indicated she approved and consented to his plans with respect to the Governor General and the monarchy. On August 1978, Marc Lalonde, the Minister of State for Federal-Provincial Relations, cited a letter from the private secretary of Her Majesty dated, July 20, which indicated that, "Her Majesty was content with the proposed changes in the Royal Style and Titles and was satisfied that the proposals would not alter the essential relationship of the Crown to Canada."[398]Lalonde would also indicate that that "the Prime Minister received a similar intimation from the Queen personally during the audience she gave him in Edmonton on August 5."[399]

In the end, Trudeau was unable to convince Canadians, his provincial colleagues, or the Canadian people to pursue his new monarchical vision. However, it would be interesting to consider idiosyncratic aspects of this Constitutional debate on the role of the Governor General. What would have occurred if an established monarchist, such as John Diefenbaker, instead of Pierre Trudeau, had proposed similar changes to Office of Governor General?[400] Was it the changes people and premiers were objecting? On the other hand, was it that Trudeau was proposing them?

With the more formal Constitutional talks that came in 1981 the issue of the Governor General and the Lieutenant Governors, discussed to a lesser extent, was resolved. The Governor General would not become a replacement for the Queen as head of state, but the office would not lose any power either. Edward Schreyer recalled that the matter regarding the role of the Lieutenant Governors and Governor General was resolved rather quickly, but it was nonetheless discussed:

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[398] Trueman, Mary. "Constitution note Queen's idea Lalonde tells MPs." The Globe and Mail. August 23, 1978. p. 8

[399] "Monarchy plan okayed by Queen" The Toronto Star. August 17, 1975 p. A. 15

[400] At this course I would like to cite the case of Richard Nixon who as a fervent anti-communist would establish diplomatic relations with the People's Republic of China. If someone that did not possess his anti-communist credentials had attempted this-there would have been outrage.

> I was there I was hosting the dinner at which it was discussed very specifically. It didn't take long I must tell you it only took about half an hour for the Prime Minister and Premiers to agree that whatever else was an issue that the clause of having to do with the reconfirmation of the office and scope of the Governor General was to be reconfirmed. That was specifically raised it was discussed even if peremptorily okay and agreed to and then we went on to other matters. But that was…no one can say that it was not discussed because it was very specifically discussed if only within thirty minutes.[401]

Charles Lynch argues similarly, "During the federal-provincial negotiations that led, after many upsets, to the present Constitutional accord (excluding Quebec), the status of the Crown was scarcely discussed at all, and even Quebec Premier Rene Levesque agreed at the outset that it should remain undisturbed, and he declined to debate the matter."[402] David E. Smith has juxtaposed the importance of Whitlam dismissal in Australia in 1975 and *Bill C-60*, "There was no reason then, in Canada in 1978, to see these contentious provisions as solely academic questions."[403] Edward Schreyer would recount that he could not remember the Whitlam dismissal being explicitly discussed, however, "… [Trudeau] would have known and I would suspect that most of the Premier's would have known if not all would have been aware of it I would think so. I had just been a provincial Premier when that happened and I was aware of it."[404]

The result of the Constitutional negotiations was described by William Christian, "over the past 15 years, we have seen how difficult it is to change the Constitution of Canada and any changes in the office of the queen [and the office of the Governor

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[401] Regan, G. A Constitutional Reform - Excerpts of Remarks By the Honourable Gerald A. Regan, Q.C. - Premier of Nova Scotia. 1978. Government of Canada . Premiers' Conference, Regina / Waskesiu, Saskatchewan, August 9-10, 1978 Canada Premiers' Conference Regina / Waskesiu Document 850. 010-015

[402] Lynch, Charles. Edmonton Journal April 14, 1982 (accessed from Alberta Legislature Library Microfiche-Governor General-1982)

[403] Smith, David E. The Invisible Crown: The First Principle of Canadian Government. University of Toronto Press: Toronto, 1995. p. 49

[404] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

General] requires the approval of the House of Commons, Senate and all 10 provincial legislatures."[405] During the Constitutional reforms of Meech and Charlottetown, the reform of the Office of Governor General and the Lieutenant Governors was not discussed. With the need for unanimous consent to change these offices, it is likely that any major change will not come any time soon.

D. Edward Schreyer

David E. Smith has described the tenure of Edward Schreyer, as a Governor General who "…expressed unhappiness with the course of Canadian politics during his years…he inferred a more active use of his reserve power (or at any rate its threat) as an appropriate weapon to cajole obstinate governments, and he signalled a more interventionist role for the Governor General to check obstinate politicians."[406] Schreyer was perhaps unique in this role, he was not only a Governor General that was dissatisfied with the state of politics, but he was one that would readily share these concerns with the media. He would continue in the tradition exemplified by his predecessor Jules Léger, agreeing that the Governor General should be allowed to speak their mind on ongoing and even controversial issues, providing they do not become partisan.[407]

A unique Governor General

Schreyer's background strongly equipped him for his tenure as Governor General. He had been a professor of international relations in Manitoba as well as an experienced politician, serving as a MLA, MP and Premier, all of which were instrumental to his understanding of the Office of the Governor General.

> I had maybe the unique circumstance of being both an advisor to the Queen's representative as well then later being the Queen's representative. When I was Premier of Manitoba, I advised the Lieutenant Governor of the province for eight

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[405] Christian, William. "No matter how outdated, the Monarchy is here to stay; [Final Edition]. " The Record. Kitchener, Ont.: Jun 17, 2000. p. H.03

[406] Smith, David E. The Invisible Crown: The First Principle of Canadian Government. University of Toronto Press: Toronto, 1995. p. 112

[407] Stewart, Edison. "Public apathy worries Schreyer. " Edmonton Journal February 6, 1983 (accessed from Alberta Legislature Library Microform-Governor General 1983)

> and a half years and that kind of experience gave a good apprenticeship in terms of understanding, really understanding I mean the Office of Governor General.[408]

While Schreyer was often viewed as a controversial Governor General and one that would serve as an excellent check on the Trudeau government, he was ironically appointed and thought of as a person that would be helpful to Trudeau's politics. Adam Dodek argues this position, "At first glance, the appointment of an NDP premier by a Liberal Prime Minister has the hallmarks of a non-partisan appointment. Yet it appears that Mr. Schreyer was appointed to the post less because of his prior service to the country than because of Trudeau's belief that Schreyer could be helpful in a projected national unity campaign."[409]

The fall of the Clark Government

Schreyer's first Constitutional test would come with the fall of the Clark minority government on December 13, 1979. Schreyer has described the events from his perspective,

> …I mean I have to explain that I have a fairly high regard for Joe Clark, certainly have a high regard for his sense of ethics, but he made the mistake in my opinion, of saying in the House of Commons without consultation that he was going to meet with the Governor General and cause writs for an election to be called, and to be issued etc. And that was wrong form. And when he came to see me I told him that while in all practical purposes that he would probably get his request that I felt not to grant him request right there and then but at least have the opportunity for x hours to consider his request and also to allow the opposition parties, although it was most unlikely, but at least to allow them the opportunity to volunteer that they had a possibility of forming an alternative government.[410]

When Prime Minister Joe Clark met with Governor General Edward Schreyer on December 14, 1979 to advice him to dissolve Parliament he was perhaps surprised at the outcome. John C. Courtney notes that, "Mr. Clark reportedly found the process to be neither so smooth nor as swift as he had anticipated…he may quite properly have been under the impression that his was such a watertight case that the whole business could be transacted in a matter of minutes."[411] What Clark had perhaps not planned for was a vigilant Governor General in Edward Schreyer who told him he would have to think about it and consider the proper course of action. The delay was approximately ninety minutes with the Prime Minister sitting anxiously to await word of the Governor General's decision, before Schreyer informed the Prime Minister that he would get his dissolution and the February 18, 1980 election he desired.[412]Edward McWhinney has argued that Schreyer's actions, "nonetheless vindicated the Constitutional principle that the Governor General is not automatically bound to cede to a prime minister's "advice" on dissolution but retains hit autonomous role with the Constitutional checks and balances to make his own independent decision based on past practice."[413]

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[408] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

[409] Dodek, Adam. "Rediscovering the Constitutional Law: Succession Upon the Death of the Prime Minister" University of New Brunswick Law Journal 2000. p. 49

[410] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

Musings about forcing dissolution

In December 1981, Governor General Edward Schreyer mused in an interview that had the Constitutional talks between Canada's ten premiers and the Prime Minister failed and had Trudeau decided unilaterally to repatriate the constitution he would have intervened. As Schreyer explained, "…the only way out…would have been to cause an election to be held and (have) the Canadian people to decide."[414]Schreyer was motivated by the fact that any attempt by a Prime Minister to patriate the constitution with the consent of just a small minority of the provinces would have been a violation of the spirit of the constitution. The circumstance of a nearly unilateral patriation without the consent of the provinces this represented a most serious breach considering the federalist tradition in Canada which can be epitomized with the citation of the opening of the *Constitution Act*, 1867, "Whereas the provinces."[415] Some 25 years later Edward Schreyer would recount his motivations and intentions in the unlikely circumstances that Pierre Trudeau would have patriated the constitution unilaterally: "It was quite theoretical because the Prime Minister Pierre Trudeau knew that and I have to give him credit for being aware of that nuance. There is no doubt at all in my mind that if a Prime Minister had tried to patriate the Constitution with the consent of one province or two, I would have felt obliged to intervene, yes that is correct."[416]

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[411] Courtney, John C. "The Defeat of the Clark Government: The Dissolution of Parliament. Leadership Conventions and the Calling of Elections in Canada." Journal of Canadian Studies. Vol. 17 No.2 Summer 1982 p. 83

[412] Ibid.

[413] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005. p. 99

[414]Collister, Ron. "Questions difficult to dismiss. " Edmonton Journal. January 27, 1982

[415] *Constitution Act*, 1867

The Governor General must ensure that the spirit of conventions is being upheld. Since there is a hierarchy of conventions a Governor General would be willing to dispense with a less important convention, namely that the Governor General should act on the advice of the First Minister or the cabinet of a responsible government, in order to protect a more important Constitutional convention. As noted by Schreyer himself Trudeau was aware that it would be the duty of the Governor General to intervene in such a circumstance. In fact, there was no real danger of Trudeau patriating the Constitution unilaterally as this excess of power would have been checked by the Governor General. This was something that Trudeau was fully aware of,

> I mean Pierre Trudeau didn't need to be educated on the Constitution, he knew that, therefore he was quite preoccupied with that whole scenario. He wanted on the one hand to patriate badly but he also knew that to do so with two out of ten provinces concurring was a violation of the spirit of the constitution, he knew that. Any newspaper reporter or editor who pretends that Trudeau would have gone "pail mail" to do that, in spite of all that, they are simply speaking from ignorance.[417]

René Levesque, the Premier of Quebec, accused the Governor General of having double standards, "Apparently the weight of Quebec was not sufficient to provoke his reactions, Now that the English provinces are happy, Mr. Schreyer can go back to sleep as usual."[418]Claude Morin, former Quebec intergovernmental affairs minister, argued that if Schreyer had made his views clear to the Premiers earlier it would have provided the provinces with a better bargaining position against Pierre Trudeau, who was threatening to unilaterally repatriate Canada's constitution: "Many of the other provinces were so convinced that there was nothing that could be done to stop Trudeau, they just went ahead and signed."[419] The Governor General, fully aware of the Supreme Court rulings such as the patriation reference, would have been aware of a similar ruling stating that Quebec did not have a Constitutional veto. The patriation reference had noted that a clear majority of provinces would have to consent to patriation. However, it did not specify which provinces. Schreyer would have felt uncomfortable threatening dissolution when the majority of the provinces had concurred with dissolution especially since no Constitutional convention would be broken.

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[416] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm
[417] Ibid.
[418] "Comment notably lacking on Schreyer's revelation. " Edmonton Journal January 23, 1982 (accessed from Alberta Legislature Library Microform-Governor General 1982)
[419] Ibid.

Prime Minister Pierre Trudeau perhaps angered at the statements by the Governor General, or perhaps the media's portrayal of Schreyer's comments, would issue a terse statement, "In accordance with Constitutional practice, and to avoid further speculation that might tend to draw the Crown into controversy, I will make no comment concerning this incident."[420] As Aileen McCabe noted,

> Whether rebuke or clarification, Trudeau made it clear Schreyer had been informed about the terse release before it was released…Sources say Schreyer and his deputy Esmond Butler spent the afternoon closeted with Trudeau's top adviser Privy Council Clerk Michael Pitfield. No tempest in a teapot brings Michael Pitfield to call.[421]

When asked about specific discussions between himself and Prime Minister Trudeau, Schreyer quite rightly refused to divulge advice given to his First Minister, "I won't go into that, because that is and would be a violation of the discussions…I don't blame you for asking but it's just that conversation that went on between two people… [are] protected by four hundred years of Parliamentary practice."[422]

The Bell-Ringing Episode

Another potential for intervention occurred in the spring of 1982 with Bill C-94, the *Energy Security Act, 1982*. As noted by Robert Marleau and Camille Montepetit, "On March 2, 1982, in response to a point of order raised the day before, asking the Chair to divide the bill, Speaker Sauvé ruled that there were no precedents which would permit her to divide the bill. This led to the famous "bell-ringing" incident…"[423]Lead by the Conservative House Leader Erik Nielsen, the opposition refused to attend to session or attend the vote on the Bill C-94. As Gerald Schmitz has noted, "By refusing to answer the bells summoning Members to a recorded vote on a related adjournment motion, the official opposition held up House proceedings while the division bells rang from 4:20 p.m., 2 March 1982 until 2:28 p.m., 17 March."[424] The opposition parties would accuse the Liberals and especially the Prime Minister, Pierre Trudeau, of using the omnibus bill to prevent debate and the hinder the right and the ability of the opposition to hold the government accountable. As Erik Nielsen noted of the omnibus bills, "they have no common thread. If the Government is allowed to go this far…it could bring one bill at the start of Parliament and then send everyone home."[425] Nielsen would continue, "It's perfectly in keeping with Trudeau's attitude toward Parliament and that MPs are nobodies… In essence what he is saying to us is 'mangez de la merde.'"[426] Even former Liberal Senator Eugene Forsey said the bill "could establish a very dangerous precedent."[427]

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[420] McCabe, Aileen. Edmonton Journal January 27, 1982 (accessed from Alberta Legislature Library Microform-Governor General 1982)
[421] Ibid.
[422] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

On March 4, the Speaker of the House of Commons, Jeanne Sauvé, had ordered the halting of all but one bell. The constant ringing of nearly 100 bells had caused malfunctions to the bells themselves as well as annoyed MPs and staff on Parliament Hill. However, the halting of the explicit reminder of the Parliamentary deadlock did not belie the fact that a Parliamentary deadlocked continued to exist. The deadlock would not break until March 17 when all parties agreed the omnibus bill should be divided into eight separate bills. If the Liberal had not acquiesced when it did, there may have been need for the Governor General to intervene. As it was, some thought intervention might have been required.

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[423] Marleau, Robert and Montpetit, Camille. House of Commons Procedure and Practice. Online 2000 Edition http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?DocId=1001&Sec=ch20&Seq=1&Lang=E

[424] Schmitz, Gerald. The Opposition in a Parliamentary System BP-47E. Government of Canada. December 1988. www.parl.gc.ca/information/library/PRBpubs/bp47-e.htm

[425] "Tory protest block energy bill debate; tieup may last days. " The Globe and Mail. March 3, 1982 p. 1

[426] Ibid.

[427] "Deadlock in Parliament taken to Public." Globe and Mail. March 6, 1982. p. 2

However, the Governor General quite rightly chose to sit out the Parliamentary deadlock. As Edison Stewart has noted Schreyer had regarded, "the bell-ringing dispute…was akin to a filibuster and nowhere near the stage where it would have required his intervention, always only a last resort."[428] Some twenty-four years later Schreyer would reflect on the bell-ringing incident, as well as noting how far the crisis would needed to go before requiring intervention,

> That's something a little different. I mean a Governor General there should be disturbed, uneasy, chagrined, troubled, but I am not sure a Governor General can do much about it in a first week or month or even I'll go as far to say three months. If it went on for six months or more then by God I'm not sure I'm not sure at all. Maybe if I were there all over again I would say by God we can take this anymore and we maybe intervene.[429]

In some situations, the Governor General must exercise patience and restraint.

Leaving Office

Leaving the office Schreyer raised concern on the lack of knowledge on the role of the Governor General. As noted by Edison Stewart, "Edward Schreyer agrees with predecessor Jules Léger that the office of Governor General could lose all credibility if public indifference to the role of the Queen's representative lasts too long."[430]Schreyer would also admit,

> I felt as a Governor General who had experience as a first minister that I might be required by circumstances to offer political advice of a broad kind…But I have come to the conclusion in modern times that those opportunities to advise come only in conditions of gravity if not crisis. We are not functioning on the brink of crisis, even though we have our problems.[431]

However, when these "conditions of gravity" arose Edward Schreyer would act appropriately.

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[428] Stewart, Edison. "Public apathy worries Schreyer. " Edmonton Journal February 6, 1983 (accessed from Alberta Legislature Library Microform-Governor General 1983)

[429] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

[430] Stewart, Edison. "Public apathy worries Schreyer. " Edmonton Journal February 6, 1983 (accessed from Alberta Legislature Library Microform-Governor General 1983)

[431] Nicholas Hills. "Pitfalls for Schreyer in Rideau Hall job." Edmonton Journal July 8, 1981 (accessed from Alberta Legislature Library Microform-Governor General 1981)

E. Jeanne Sauvé

Jeanne Sauvé, Canada's 23rd Governor General, who served from 1984 to 1990, sought to enhance her vice-regal role. Sauvé was determined to change the perceptions of her office as one that was strictly ceremonial, "It needs to have more substance…I have struggled with that since I came in."[432]An anecdote to illustrate her efforts came with the 1985 NATO military committee held in Banff. The organizers of the meeting saw her role as one where she would give a brief opening address. Instead, she showed up with a fourteen-page speech. Their response, Sauvé recalled, was "They said. It's not necessary-all we need for her is to say welcome."[433]Sauvé nonetheless gave a speech that perhaps did not sit very well with the military officers in attendance when she argued that technology should be used for peaceful objectives rather than military ones.[434]

Advice that should have refused

It is clear that there was a circumstance early in her term in which Sauvé should have intervened and refused the advice of two Prime Ministers. This came in 1984, after Pierre Trudeau had announced his resignation on February 29th. After Trudeau announced his resignation he continued to make decisions right up until the end of his tenure even influencing his successor John Turner, as the CBC has recounted,

> In the waning days of his power, Pierre Trudeau named 218 loyal Liberals to plum government jobs. The list included six sitting MPs, including Eugene Whelan and Bryce Mackasey, and reduced the Liberal majority in Parliament to a minority. To alleviate some of the negative publicity, Trudeau suggested to his potential successors in cabinet that they defer some of the appointments until after a new leader was selected. Turner, the front-runner, agreed to a written deal that committed him to make 79 of Trudeau's controversial patronage appointments after the leadership convention.[435]

The Governor General arguably should have refused some of the appointments as Trudeau had no intention of continuing as Prime Minister and therefore should not have been entitled to the volume of appointments that were made. There is no parliamentary tradition in Canada that when a head of government retires he or she is able to appoint loyalists to plum positions.

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[432] Young, Kathryn. "Sauvé tries substance in Governor-General's job." Edmonton Journal. December 20, 1987. (accessed from Alberta Legislature Library Microform-Governor General 1987)

[433] Ibid.

[434] Ibid.

[435] http://archives.cbc.ca/IDC-1-73-2324-13534-11/on_this_day/politics_economy/twt

John Turner had even requested some of the appointments on the same day as he requested the dissolution of Parliament and the calling of general elections. Sauvé should have especially refused that request saying to the Prime Minister if you win the election I will be more than happy to make these appointments as long you are not being coerced to do so. Come back to me when you have a mandate from the people. For Turner to request appointments on the same day as the calling of elections is perhaps indicative of his lack of confidence in a victory in the election. If fact, he ended up losing the election.

With respect to advice given to a Governor General or Lieutenant Governor during or close to an election, or after the announcement of a resignation by a first minister, that official should nearly treat such advice the same as she or he would a defeated government. Elections provide the prospect that a government will be defeated and are typically periods when the government is operating at scarce capacity. Resignations usually come after, or it appears imminent, the first minister either has lost or will lose the confidence of the House of Commons, the Cabinet, the caucus or the people. First ministers rarely resign at the top of their game and the height of their popularity. A precedent for a Governor General in Canada refusing the advice of a Prime Minister with respect to appointments came in 1896 when Lord Aberdeen refused the advice of the defeated Conservative government in making appointments. Sauvé should have considered this precedent before she made the appointments.

A private State visit

The state visit by Ronald Reagan in 1985 does deserve study. In February 1985, the Prime Minister's Office informed the Private Secretary to the Governor General, Esmond Butler, that the American President had been invited to Quebec City for a March visit. This was a private working visit that would not require her presence. As well, the Prime Minister was requesting the use for himself and President Reagan the use of the Citadel, the Quebec City residence of the Governor General. As Shirley E. Woods has described, "Butler went to Her Excellency and warned her that in all likelihood this would be a very public event, designed to enhance the Prime Minister's image." The response of Governor General Sauvé was that, "The Citadel is my residence, and nobody is going to entertain there unless I'm the host."[436] As in turned out, Butlers prediction was correct. The private meeting would soon become arguably the most publicized meeting between a Canadian Prime Minister and an American President in history. The press dubbed the March 17th meeting at the Citadel the Shamrock Summit. Shirley Woods details the very private reception that Reagan received upon landing in Quebec City: "he was greeted by the Prime Minister, 101-scarlet-coated Mounties, a full military guard of honour, a thirty five piece band, and a twenty-one gun salute. All the trappings of a state welcome-except for the Governor General."[437] However, Sauvé would soon get her revenge and provide a warning to the Prime Minister Brian Mulroney at the Parliamentary Press Gallery Dinner in April 1985 when she read a poem to the audience,

> The Irish were at it, the shamrocks were golden,
> Mulroney and Reagan don't seem beholden,
> For the use of the Fort, and the loan of the key:
> They were workin', they said, there was no use for me.[438]

Sauvé made it clear that she did not appreciate being left out and even misled about the Shamrock Summit. However, this would not be the last time that Mulroney would use a Governor General's residence for political purposes.

The 1988 Federal Election

Ironically enough, the calling of the election for November 21, 1988 began with another faux pas on the part of Prime Minister Mulroney. On October 1, 1988, Prime Minister Brian Mulroney visited Rideau Hall to ask for a dissolution. Afterward, he chose to hold a press conference on the steps of Rideau Hall. In response to this, the Toronto Star placed Mulroney in their editorial darts section "for affronting protocol and the Governor General Jeanne Sauvé,"

> Canada's Parliamentary system carefully separates the roles of head of state and head of government. Mulroney's act blurred the distinction and quite improperly

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[436] Woods, Shirley E. Her Excellency Jeanne Sauvé. Macmillan Canada: Toronto, 1986. p. 217

[437] Ibid.

[438] Ibid. p. 219

> involved Sauvé in partisan politics. Who does Mulroney think he is? President?[439]

Several days later, the Toronto Star would report, "Governor General Jeanne Sauvé has made the usual vice-regal announcement that for the duration of the federal campaign she 'will restrict her public engagements.'" The Toronto Star would extrapolate this as being connected to the Mulroney's use of Rideau Hall as a political "prop."[440] No less a political authority than John Duffy would confirm Sauvé's anger, "a bit of gossip from one of Duffy's Deep Throat contacts: Governor General Jeanne Sauvé was ticked off that Mulroney made the announcement in front of her residence."[441]

With the election, it soon became apparent that the Governor General might have some discretion in deciding the outcome. When the election began, pollsters reported that neither the Conservatives under Brian Mulroney nor the Liberals under John Turner would receive enough votes for a majority. For the Conservative Prime Minister, Brian Mulroney, history did not seem to be on his side. The Conservatives had not won consecutive majorities since 1891. A November 13th Gallup poll had John Turner and Brian Mulroney tied with 35 per cent support.[442]Suddenly, Governor General Jeanne Sauvé was seen as very relevant to the election. Jonathan Manthorpe of Southam News observed that, "the stage is set to remind Canadians that the vice-regal personage of Rideau Hall is not just there to be trundled out on ceremonial occasions, but performs an essential role in the Constitution."[443]

On the date of the election, the Financial Post predicted that Mulroney would most likely win the election. There was, however, a large possibility that the Conservatives would win a minority. In that event, the Free Trade Agreement, the centerpiece of the Conservatives election platform, could cause the downfall of the government, as it did not have the support of the NDP or the Liberals. In fact, both parties had campaigned strongly against it. The Financial Post described this prospect: "Any attempt by a minority Tory administration to pass enabling legislation through the House of Commons would almost certainly result in defeat. Governor General Jeanne Sauvé then could ask Liberal Leader John Turner if he can command the confidence of the House." [444]As it turned out, Mulroney would win a majority with 169 seats in the House of Commons, although this was down significantly from the 211 he had won in 1984. Nonetheless, this case study demonstrates the importance of the Governor General when the electorate is not decisive enough to return a majority to the House of Commons. It also demonstrates that even if there is a hint that the electorate will not be decisive, it is the role of Canada's vice-regals to be decisive for them.

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[439] Editorial. Toronto Star October 5, 1988 p. A28
[440] "Turner aide berates media for refusing to 'play game'" Toronto Star. October 9, 1988 p. A.11
[441] Bawden, Jim. "Duffy's at his best when he's gossipy. " Toronto Star. Ontario 3, 1988 p. C.7
[442] "51 historic days were marked by controversy. " Toronto Star November 21, 1988 p. A8
[443] Manthorpe, Jonathan. "Sauvé could be choosing next government. " Edmonton Journal. November 18, 1988. p. 1

Meech Lake

While Pierre Trudeau was one of the most outspoken critics of Meech Lake, Jeanne Sauvé, a Governor General appointed on his advice did not share his sentiment. In her final speech as Governor General Sauvé declared, "Unity is an illusion if it is not based on defined foundations that promise to be durable…unless the parties involved ratify their pact and do not let Canada drift into an unforeseeable future."[445] The reference to Meech, which was being debated at the time, was obvious. On national television, Sauvé had implicitly given her full support for the agreement. Sauvé met the ire of a fellow Liberals, including the Premier of Newfoundland Clyde Wells, "I think it was inappropriate for the Crown to be commenting in that way."[446]Some in the media did come to the defence of Sauvé. William Gold argued that

> Thus she was fully entitled to say what she said. In fact, some life could be breathed into the moribund goings- on at Rideau Hall if her freshly sworn- in successor, Ray Hnatyshyn, were to pick up the ball and craft the occasional thought about how this country ought to function. For example, if Prince Charles can criticize practically every building erected in Britain during the past half-century, surely Canada's royal surrogate (as long as one remains) should be empowered to comment on the basic architecture of the Canadian state.[447]

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[444] Bagnall, James. "Business fearful of election deadlock. " Financial Post. November 21, 1998 p. 1

[445] http://archives.cbc.ca/IDC-1-74-1593-10930/people/jeanne_sauve/clip10

[446] "Sauvé accused of politicking"; [Final Edition]. Calgary Herald. Dec 30, 1989. p. A.7

[447] Gold, William. "Canada needs to dump one more colonial custom; [Final Edition]". Calgary Herald. Calgary, Alta.: Jan 3, 1990. p. A.5

In the end, not even the endorsement by the Governor General would save Meech Lake.

Ceremonial Controversy

Curiously enough, the greatest controversy for Sauvé came with her more ceremonial decisions, not her political ones. Sauvé decided to increase security at Rideau Hall, a move that came at the expense of public access to the grounds. In fact, the Rideau Hall grounds as described by Paul Schwartz were "so popular with joggers and tourists were closed to the public."[448] The Rideau Hall grounds became inaccessible after the construction of a $705,000 fence. The construction of a fence around the residence of the Governor General was a contradiction given that the position is a unifying force for Canadians. The fence would even provoke criticism from long-time supporters such as Eugene Forsey, who contended that as a Speaker of the House of Commons Sauvé was a "very able, experienced Parliamentarian," but as a Governor particularly in light of the construction of the fence Forsey mused, "[I] wonder if she's as well-fitted for the offices as I'd assumed."[449] Sauvé would also earn criticism for her expenses: some $91,000 on furniture purchases and maintenance, $18,000 for a wine cellar cooling unit, $24,000 for the construction of a skating rink, $38,000 on art conservation, $22,000 on security systems and of course the $705,000 fence.[450] Canada's next female Governor General could certainly relate to criticism over expenses.

F. Adrienne Clarkson

In September 1999, Adrienne Clarkson, was announced as Canada's 26th Governor General since Confederation. In the interviews that would soon follow, Clarkson would be quick to dismiss the popular view of the Governor General as being impotent. When a reporter described the Office of Governor General as "an apolitical position," Clarkson rebutted that description replying to the reporter that this description made "it sound as though it [the Office of Governor General] has no ideas in it."[451]

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[448] Paul Schwartz. "When the fence went up, Sauvé's popularity went down. " Edmonton Journal. Edmonton, Alta.: Oct 7, 1989. p. A.4

[449] Ibid.

[450] Ibid.

[451] Bryden, Joan. "Gov. Gen. Adrienne Clarkson won't be silenced by protocol; [Final Edition]" Edmonton Journal. Edmonton, Alta.: Sep 9, 1999. p. A.1.

Clarkson would raise eyebrows with her assertion of “Being set apart from the everyday political fray does not mean not having ideas. I do want to discourage that idea because I think that you can have a lot of ideas.”[452] Clarkson would also note the importance of the Governor General to “speak her mind” on ethical matters.[453]

Installation

In her installation address, Adrienne Clarkson continued on the themes, promising to follow the footsteps of Canada’s first Governor Samuel de Champlain, who had once noted, “As for me, I labour always to prepare a way for those willing to follow.”[454] Clarkson would cite the actions of Lord Elgin who helped Baldwin and LaFontaine shape Canadian democracy as well as the political theorist Eugene Forsey: “The Governor General is one skein in the woven fabric of what Eugene Forsey characterized as our ‘independent sovereign democracy.’”[455]Nonetheless, many in the press continued to criticize Chrétien’s choice of Clarkson as Governor General,

> Clarkson will be briefed regularly by top officials on sensitive domestic and foreign issues and meet privately with the prime minister every few weeks. In the past, prime ministers have used those sessions as public policy sounding boards and to seek confidential advice. Opposition politicians also frequently lobby on sensitive issues when the government's course is not solidly founded in law or precedent. Her lack of political experience and personal relationships with the key players is a significant and potentially dangerous disadvantage.[456]

The Edmonton Journal article pointed out that the lack of personal relationships with key players was slightly inappropriate. However, a Governor General and a Lieutenant Governor should be a neutral party, as in the event of some need for Constitutional arbitration it would be inappropriate for a governor to have a personal relationship with any of the actors. Many of the criticisms were merely criticisms for the sake of criticism. However, Clarkson soon proved to be a skilled Governor General. When the media attempted to draw her into making unnecessary political comments she would quip, “If I have a view on that, I will communicate it to the Prime Minister, to whom I have a direct conduit."[457]

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[452] Ibid.

[453] Ibid.

[454] “Following in the footsteps of Champlain: Governor-General Clarkson hopes for a better society; [Final Edition]” Edmonton Journal. Edmonton, Alta.: Oct 8, 1999. p. A.22

[455] Ibid.

[456] Travers, James. “Governor-General Clarkson must learn to bite her tongue. “ The Spectator. Hamilton, Ont.: Oct 7, 1999. p. C.2

A Co-Governor General?

With the appointment of Adrienne Clarkson came a sort of symbolic co-Governor General with Clarkson's famous philosopher husband, John Ralston Saul, a world-renowned academic who studied and wrote on sociology and politics. Jean Chrétien joked with the announcement of her appointment, "So I guess that over dinner they might, between the two of them, come (up) with a pretty good conclusion."[458] Saul was often highly opinionated on social and political issues. He responded to questions from the media on whether he would tone or censor himself as Consort by saying, "I'll make an effort to remove about 1% and I think that will just about do it."[459] In 2001, John Ralston Saul would raise controversy with the publication of his book On Equilibrium, which delved to several controversial topics. In the immediate aftermath of 9/11, Saul wrote that, "Christian militancy has wreaked far greater destruction than anything managed by Islam."[460]This would earn Saul criticism from the Canadian Alliance, Interim Leader John Reynolds would claim, "His remarks are not those of an ordinary private citizen but those of a representative of the Crown."[461] Prime Minister Chrétien would defend him noting, "He has the right to write whatever he wants…Marriage doesn't force people to be a prisoner of the other…That's the way it is in our society. My wife has the right to criticize me if she wants. But she's very satisfied with me, so what can I say?"[462] The scandal, however, was part of the media and desire of politicians to create intrigue and scandal for the Office of the Governor General, even if vicariously through the spouse of the Governor General. Even though it was joked that Saul was a co-Governor General, this assertion had no legal basis.

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[457] Jackson, Robert J and Jackson, Doreen. Politics in Canada: Culture, Institutions, Behaviour and Public Policy. 5th Edition. Prentice Hall: Toronto, 2001. p. 260

[458] Cheadle, Bruce. "Clarkson's appointment a package deal: Husband expected to be prominent, and some feminists are irked; [Final Edition]" Prince George Citizen. Prince George, B.C.: Sep 10, 1999. p. 6

[459] Fife, Robert. "Activists to move into Rideau Hall: PM picks nationalist: Broadcaster says she and her husband won't temper views; [National Edition]" National Post. Don Mills, Ont.: Sep 9, 1999. p. A.1.

[460] Thorne, Stephen. "Governor-General's husband can write what he wants: PM; [Final Edition]." Expositor. Brantford, Ont.: Dec 14, 2001. p. A.9

[461] "A man's place: seen but not heard?; [Final Edition]" Telegram. St. John's, Nfld.: Dec 15, 2001. p. A.10

[462] Thorne, Stephen. "Governor General's husband can write what he wants: PM; [Final Edition]" Expositor. Brantford, Ont.: Dec 14, 2001. p. A.9

Expenses

Expenses became a major controversy for Clarkson during the later part of her term. In October 2003, the media discovered that the budget of the Office of the Governor General was $35 million and had jumped more than 70 per cent since Clarkson's appointment in November 1999.[463] New Democrat MP Pat Martin would criticize the expenses noting, "It would be a great opportunity to send a profound message about our concern and would show the public that we will not give one more cent, not one more dollar, to the Governor General until we have a full examination of what we want that office to do. Budgets are not supposed to explode that exponentially."[464]

The largest concern came with Clarkson's $5.3 Million circumpolar trip to Russia, Iceland and Finland in September 2003. Clarkson had taken with her on the trip 60 prominent Canadians "ranging from Inuit elders and artists to architect Arthur Erickson, filmmaker Denys Arcand and author Michael Ondaatje."[465] In February 2004, the final figures were released and juxtaposed with the originally forecasted cost of $ 1 million. The earlier cost had already caused a scandal in the fall as being too expensive and the final figures caused even more controversy.[466] The Liberal government admitted that they felt the trip was too expensive. As Foreign Affairs Minister Bill Graham would note, "It would be unreasonable not to recognize that this was very expensive. I think we have to look at the ways we can constrain these expenses, and work with the Governor General's office to make sure we are getting absolute value for everything we do."[467] Another planned state visit by the Governor General was cancelled just days after the figures for her previous trip was announced. As Tonda MacCharles would note of the earlier trip, "When the bill came in the total exceeded even the government's own projections, which were around $4.5 million. Coming in the midst of the sponsorship scandal over wasted taxpayer dollars, the tab embarrassed an already embattled government."[468] Members of the opposition, such as Conservative MP John Williams, would applaud the cancellation of the trip: "I'm glad and I hope that wherever she goes next time, at least they'll come out and give us the real goods."[469]

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[463] May, Kathryn. "Gov. General's costs now total $35M: Other department contributed $15M" Edmonton Journal. October 21, 2003 p. A.3

[464] Ibid.

[465] Ward, John. "Clarkson unfairly condemned for $1M trip, academics say. " Edmonton Journal. Edmonton, Alta.: Sep 29, 2003. p. A3

[466] Alberts, Sheldon and Paraskevas, Joe. "Governor General's budget may be slashed after $5.3M. " Edmonton, Alta.: Feb 14, 2004. p. A.6

[467] Ibid.

Because of her trip and additional expenses, some Members of Parliament were highly critical of the Governor General. Again, Pat Martin of the NDP would note, "I'm moving a motion to reduce her budget by $5.3 million. She might have to switch to a different brand of caviar at Rideau Hall for a couple of years."[470] Other Members of Parliament would call for greater scrutiny of the expenses of the Office of the Governor General. Clarkson would refuse appearing before a public accounts committee noting that she is "above politics...And I don't mean to be above politics, I am above politics."[471] Parliament would reduce Clarkson's budget from nearly $20 million to $ 16.8 million in December 2004 as "a show of disapproval of a $5-million circumpolar tour by Clarkson to Russia, Iceland and Finland."[472]In response, Clarkson would in addition announce a self-imposed cut to her office of $400,000.[473] Some academics, such as Michael Cross, defended Clarkson noting that she was one of the most accessible and high profile Governors General in history. [474]

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[468] MacCharles, Tonda. "Clarkson's polar travel put on ice by Liberals; Second leg of tour not needed now, Bill Graham says First 'Quest for Modern North' cost $5.3 million. " Toronto Star. Toronto, Ont.: Feb 19, 2004. p. A.07

[469] Curry, Bill.. "Clarkson's next Nordic trip iced as government eyes costs. " Edmonton Journal. Edmonton, Alta.: Feb 19, 2004. p. A.6

[470] Alberts, Sheldon and Paraskevas, Joe . "Governor General's budget may be slashed after $5.3M trip. " Edmonton Journal. Edmonton, Alta.: Feb 14, 2004. p. A.6

[471] Mills, Andrew. "Clarkson wanted polar trip defended. " The Vancouver Sun. Vancouver, B.C.: Oct 10, 2005. pg. A.4

[472] "Clarkson takes cut, firearms registry doesn't:" Edmonton Journal. Edmonton, Alta.: Dec 10, 2004. p. B.10

[473] Ibid.

[474] Ward, John. "Clarkson unfairly condemned for $1M trip, academics say. " Edmonton Journal. Edmonton, Alta.: Sep 29, 2003. p. A3

Nonetheless, the perception persisted that Clarkson was an elitist and well-to do traveller- all at the expense of the taxpayer. This outcry over her expenses clearly did damage her reputation. As noted by Tim Naumetz, "Until criticism of the circumpolar trip erupted on Sept. 11, 2003, Clarkson's tenure had been marked generally by positive statements about her many visits to small towns and cities across Canada, the expansion of public accessibility to Rideau Hall and her dedication, as commander-in-chief, to members of the Canadian Forces."[475]

The Sponsorship Scandal

The federal sponsorship scandal had many similar elements to that of the Roblin Scandal in Manitoba in 1915. The Gomery Commission that would follow certainly had all the attributes of a Royal Commission. In fact, some scholars have argued that the investigative powers that Paul Martin gave the Gomery Commission were tantamount to political suicide. It would be interesting to speculate on the involvement of the Governor General with respect to the Gomery Commission. Did the Governor General advise its creation? What exactly was her role? Did Governor General give the Prime Minister an ultimatum? It would be unthinkable that in one of the regular meetings between the Governor General and the Prime Minister that the Sponsorship Scandal was not addressed. After all, as Thomas Axworthy has explained, final accountability for the operation of Government lies with the Governor General,

> A clearly defined accountability system is crucial to representative democracy, because citizens through their vote legitimize or give authority to leaders to act. Accountability answers the question, "Who reports to whom for what?" The electorate confers the formal power to act or be authoritative to members of Parliament from whose ranks the Governor-General calls on one of the leaders to be Prime Minister, who in turn is accountable to Parliament, and the accountability chain continues down the line with ministers and deputy ministers being accountable to the Prime Minister, senior officials being accountable to the ministers, and director generals being accountable to the deputy ministers.[476]

Had the Governor General felt that the impropriety of Prime Minister was severe enough, or had it been discovered that the Prime Minister was complicit in some criminal misconduct and refused to resign or allow an investigation of the matter, the Governor General would have ample and just cause to dismiss the Prime Minister. The applicability of this doctrine to Canada has established precedents in Manitoba in 1915 and in British Columbia as recently as 1991.

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[475] Naumetz, Tim "Well-travelled Clarkson not just a figurehead: High expenses created controversy. " Edmonton Journal. Edmonton, Alta.: Aug 5, 2005. p. A.10

[476] Axworthy, Thomas S. "Accountability pillars lie in rubble. " National Post. Don Mills, Ont.: Feb 11, 2004. pg. A.18

The 2004 Federal Election

The June 29, 2004 federal election was the first since 1988 with a potential for a minority government. Again, many in the media suddenly saw the Office of the Governor General as politically relevant. The Sponsorship Scandal had ruined the chances of the substantial majority that Paul Martin all but guaranteed before he took office. As it was, the Liberals and the Conservatives were running neck and neck in the polls with neither in majority territory. As was noted by Bruce Garvey, "Next Monday's federal election may result in a Constitutional Crisis; it may not. But in all probability, Gov.-Gen. Adrienne Clarkson will be the one who decides whether Primer Minister Paul Martin or Conservative Leader Stephen Harper is invited, at the Queen's pleasure, to form the ninth minority government in Canada's history."[477] Garvey had given a better explanation than provided by the Times-Colonist, which argued, "There's a lot of nonsense being written about Clarkson consulting learned authorities about what to do. She can consult retired chief justices, the Dalai Lama, even -- God forbid -- John Ralston Saul until she's blue in the face, but in the end only the advice of her first minister counts."[478] The Times Colonist would even mention that in the event of no party obtaining a majority Harper could not become Prime Minister, unless Martin let him."[479] As has been and will continue to be for some time, if a Governor General finds that the advice of the first minister or another minister is not tenable or lawful, there is an ability to refuse the request. First Minister's are not given carte blanche. If this means that the Governor General needs to dismiss a ministry and commission a new one that will give lawful and tenable advice and can command the confidence of the House of Commons, then this route will be pursued. While the Time-Colonist would argue if Harper came one seat short of a majority, "Martin says he thinks he can carry on, the Governor General can't decide otherwise on her own or based upon what others tell her."[480]However, the Supreme Court had ruled on nearly this exact scenario in the patriation reference citing such a circumstance as nearly tantamount to a coup. If the Governor General felt that the Prime Minister had been defeated, relative to the Opposition in the election, she could advocate or even force his resignation. In this situation, the sentiment of Sir William Anson needs to be invoked. Anson stated in 1913, "If the King should decide in the interests of the people to take a course of action which his ministers disapprove, he must either convert his ministers to his point of view or, before taking action, must find other ministers who agree with him."[481]While the Governor General is not a monarch, as a viceroy the position is not very far off legally speaking. For a precedent of a Governor General exercising his or her own discretion the Times-Colonist should look no further than the Whitlam Dismissal in Australia in 1975.

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[477] Garvey, Bruce. "GG could be front and centre on June 29. " Canwest News. p. 1 June 21, 2004
[478] "No quick decision on minority status. " Victoria Time-Colonist. June 20, 2004 p. D.2
[479] Ibid.

The Canadian Constitution is clear that the Governor General can seek the advice of the Privy Council, or Councillor, nowhere does it say minister or Prime Minister or the cabinet. In a situation where the Prime Minister has been soundly defeated in the polls, the Leader of the Opposition, typically a Privy Councillor could appeal and advice the Governor General to appoint him or her. With respect to the discretion of the Governor General or Lieutenant Governor, the word "can't" is not in vice-regal the vocabulary. Other words such as, "should not" and "would be wise not to do so" are. However, all this debate would soon prove moot, at least for a short term after Prime Minister Martin was able to win a minority along with tentative NDP support. The 38th Parliament would nevertheless provide more opportunities for the Governor General to exercise her discretion.

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[480] Ibid.
[481] Marshall, Geoffrey. Constitutional Conventions: The Rules and Forms of Political Accountability. Clarendon Press: Oxford, 1984. p. 54

The 38th Parliament and Vice-Regal Intrigue

The opening of Canada's 38th Parliament in September 2004 was the first in with a minority government since 1979. As is the nature with minority governments, some general practices that are common with majority governments are debated. The opposition parties jointly stated that the ability of the Prime Minister to call an election was one of those debatable points of interest. The "co-opposition" wrote a letter to the Governor General on September 9, which included the following:

> We respectfully point out that the Opposition parties, who together constitute a majority in the House, have been in close consultation. We believe that, should a request for dissolution arise this should give you cause, as Constitutional practice has determined, to consult the Opposition leaders and consider all of your options before exercising your Constitutional authority.[482]

Included in this letter were confidence vote thresholds, agreed upon by the opposition, outlining votes the opposition thought were acceptable in triggering an election. The Liberal cabinet minister Mauril Bélanger responded angrily to these opposition positions,

> You can't on the one hand say we are going to change and vote down and modify substantially the government's program yet not treat that as confidence. Then we're getting into a Constitutional quagmire," he said. "If the government acts and the opposition parties together, without forming a coalition, say 'we don't agree, therefore we're voting against,' that's a non-confidence thing and the consequence is an election unless they form a coalition.[483]

There was no specific reaction to the letter from the Governor General or her office. Clarkson did extend invitations to the opposition leaders for discussions but this was before the opposition letter was sent to her. It is common for a Governor General to hold private discussions with leaders of the opposition, especially in a minority, as stated by one of the Governor General's spokespersons, Randy Mylyk: "It's very much a normal practice for the Governor General to meet with opposition leaders on a confidential basis, to keep abreast of Parliamentary issues."[484]Mylyk noted also that the Governor General was not planning to discuss the September 9th letter sent by the opposition, but Karl

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[482] Curry, Bill. "Opposition plan called 'constitutional quagmire'" National Post. Don Mills, Ont.: Sep 11, 2004. p. A.6

[483] Ibid.

[484] Ibid.

Belanger, a spokesperson for the New Democratic Party, contradicted this assessment, "I'm sure that issue might come up. The Governor General is well aware of our request in that sense."[485]

In this arrangement the opposition parties had seemed to have formed a coalition that was willing to govern, but not in the open, but from the background. Andrew Coyne makes an excellent assumption for why this was the case,

> If the opposition parties are prepared to form a government, they should say so -- and present some evidence that it would be more than a temporary arrangement. But that would mean confessing to some sort of coalition -- which all three parties have sworn they would never enter, and which the Liberals would ride for all it was worth. (In the West: "the Conservatives are in bed with the separatists." In Quebec: "the Bloc is in league with the Devil.")[486]

Stephen Harper, as Leader of the Opposition, would call the Governor General to intervene. In May 2005, the role of the Governor General and her intervention was cited in the context of the Parliamentary shut-down imposed by the opposition parties. During this time, the opposition was able to adjourn Parliament early for three straight days by passing motions that the Liberal minority and their erstwhile NDP allies were unable to defeat. Stephen Harper cited the ability of the opposition to shut down Parliament as an indication that the minority Liberals had lost the confidence of Parliament and therefore the Governor General would be required to intervene "I think the Governor General will have to look herself at what's occurring here. I think she should be concerned that she has a government that does not have a mandate from the House of Commons."[487] Harper also noted that the Parliamentary shutdown "could go on until the government or the Governor General is forced to admit that the government's lost its mandate to govern the country."[488] Gilles Duceppe, the leader of the Bloc Québécois, implicitly supported

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[485] Ibid.

[486] Coyne, Andrew. "The 'co-opposition' must be careful;" [National Edition] National Post. Don Mills, Ont.: Sep 11, 2004. p. A.20

[487] Dawson, Anne & Woods, Allan. "Harper calls of GG: Tories, Bloc shut House, want Clarkson to step in:. " National Post, Don Millis, Ont.: May 13, 2005. p. A.1 Fro

[488] McGregor, Glen & Laucicus, Joanne. "Deadlock is not a crisis, expert say: Clarkson's intervention unlikely professors says. " The Ottawa Citizen. Ottawa, Ont: May 13, 2005. p. A.4

Harper opinions on vice-regal intervention, "It's up to Governor General to make her own decision. The only thing I know is everything is paralyzed and that's very clear."[489]

Earlier that week, there were allegations that the Liberals were ducking a confidence vote and were refusing to concede that lost votes were in fact confidence votes. Duceppe had noted, "I think there will be in the population a reaction against the Liberals... And I think it would be a duty of the Governor General to Paul Martin to tell him a few things about democracy."[490] However, the Liberals would note that the votes on which the Liberals were defeated in the House where not confidence votes. As described by Scott Reid, a senior adviser to Prime Minister Martin. "This is a procedural motion and as such it is empirically not a matter of confidence."[491] The Conservatives and Bloc disagreed. Of particular concern was a vote on May 11 in which the opposition parties defeated the government in the House of Commons by a vote of 153-150 and passed a motion, which called for the Government to resign. However, if it had truly been a matter of confidence and had the Liberals refused to call for an election or resign the Governor General would have intervened. Even if it had been a confidence vote, the Michener precedent firmly established that the Governor General has the final decision as to what is in effect a confidence vote. With the impasse, the Governor General had been considering intervention.

Rideau Hall had confirmed that the Governor General was monitoring the situation. "Her Excellency…is closely following the situation…In recent days, the Governor General has had a number of consultations with leading Constitutional advisors."[492] According to an insider within Rideau Hall, "there had been a marked increase in communication with these advisors."[493] The Governor General had also consulted with the Prime Minister, though these discussions were *in camera*. The PMO responded to media inquiries questioning of what exactly the Prime Minister and the Governor General had discussed by noting that the Prime Minister and the Governor General meet regularly to discuss her schedule. The PMO would not confirm whether any possible intervention by the Governor General was at all discussed in these talks.

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[489] Dawson, Anne and Woods, Allan. "Harper calls of GG: Tories, Bloc shut House, want Clarkson to step in." National Post, Don Millis, Ont.: May 13, 2005. p. A.1 Fro

[490] Woods, Allan. "Liberal won't go quietly, regardless of key vote. " Edmonton Journal. Edmonton, Alta May 10, 2005. p. A.3

[491] Ibid.

[492] Dawson, Anne and Woods, Allan. "Harper calls of GG: Tories, Bloc shut House, want Clarkson to step in:. " National Post, Don Millis, Ont.: May 13, 2005. p. A.1 Fro

[493] Glen McGregor & Joanne Laucicus. "Deadlock is not a crisis, expert say: Clarkson's intervention unlikely professors says. " The Ottawa Citizen. Ottawa, Ont: May 13, 2005. p. A.4

Some in the academia and the media expressed concerns that this entire situation was highly unusual. Edward Ratushny, a law professor at the University of Ottawa, noted, "It would be a remarkable thing for her to step in and call an election. It's almost inappropriate for Harper to suggest that."[494] Ratushny noted that while the Governor General would meet with the Prime Minister, she was not required to meet with Harper, "There is no reason for her to see him. If she wanted to be polite and see him, she could say 'thank you very much' and send him on his way."[495]However, the concerns and assertions of Stephen Harper and Gilles Duceppe could have been easily demonstrated had they, not the Liberals possessed the confidence of the House of Commons. A simple show of no confidence on a clear motion would have done this. Edward Schreyer has noted, "Whatever a Governor General does he cannot be seen to be doing it at the request or behest or threat or pressure of anybody including the Leader of the Opposition."[496] Clarkson rightfully did not allow herself to be pressured.

There are some parallels between Stephen Harper in May 2005 and Malcolm Fraser of Australia in 1976. Both were Leaders of the Opposition that lobbied for the intervention of the Governor General, as they perceived a Constitutional quagmire. The only difference is that the Australian Governor General chose to commission as Fraser as Prime Minister while Adrienne Clarkson chose not to intervene. This was the right decision as Edward Schreyer has said,

> The Governor General when he's taking to anybody other than the Prime Minister can only be talking to somebody who's got numbers to back him up and only

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[494] Ibid.

[495] McGregor, Glen and Laucius, Joanne. "Deadlock is not a crisis, expert say: Clarkson's intervention unlikely professor says. " The Ottawa Citizen. Ottawa, Ont: May 13, 2005. p. A.4

[496] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

> then. Otherwise, he's asking for instability which is the one and only thing that the Governor General must not invite. The Governor General must always look for stability in government that's his job. Stability, continuity and so if he will only get involved if the government has already shown signs of being destabilized and incapable of achieving stability. Then the question arises either an election or alternative arrangement. If it's after two years then the prospect of an election seems the best way. But if it's only three or four or five or six or seven or eight or nine or ten or eleven or twelve months then a Governor General should want to avoid what I call the repetitious election syndrome which has plagued some European countries in the 1950's.[497]

Clearly, Stephen Harper did not have the numbers to back his claims otherwise he could have easily demonstrated in a clear confidence vote that he, not the Liberals, could have commanded the confidence of the House of Commons. While Clarkson would play her Constitutional role admirably, there were still some lingering frustrations.

Post-Governor General Criticism

After leaving office Clarkson would criticize the federal government for failing to defend her from the criticism she received from the media. Clarkson after all was attempting to serve the role that politicians and the public have come to expect of the Governor General as a unifying force that travels the country and represents Canada abroad. However, there was incongruity. She would be expected to do, all this, but without spending any money. With respect to her circumpolar trip, there were some key facts that were lost to the media, namely that she had been asked to take the trip by Foreign Affairs. When the controversy did emerge, the government and Foreign Affairs did not do an adequate job, in Clarkson's opinion, of defending her. "They didn't really think about it very much. It was like forgetting, leaving- the-back-door-open sort of thing when you go off to do your grocery shopping."[498] Clarkson felt forced to defend herself and mentioned that she was above politics, a course of action that she would later admit that she regretted,

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[497] Ibid.

[498] Mills, Andrew. "Clarkson wanted polar trip defended. " The Vancouver Sun. Vancouver, B.C.: Oct 10, 2005. p. A.4

> I don't think I should have done that, because I think I let the office down in that sense. The government should have done it in the House. That's where the defence should happen, in the House.[499]

After Clarkson left office, many would come to her defence and cite her important contribution to Canada, as well as offer some criticism for the federal government. The President of the monarchist League, John Aimers, would argue, "I think history will treat her kindly. I think it will reflect that she was hung out to dry by the same government that encouraged her to travel as much as she did."[500] Clarkson would reflect that the Office of Governor General was one not widely understood, "I don't blame anybody. I just think that a lot of people, including people in government, don't understand what exactly the role is that the Governor General plays and that the government plays."[501] This was perhaps troubling for Clarkson who had played a remarkable role in helping navigate Canada from a tumultuous period that included scandal and war. In the end, Clarkson said she did not mind being criticized if there were legitimate complaints, however she did not feel that this was the case, "But when they attack you and they simply do it out of malice, ignorance ... then it doesn't really touch you personally."[502]

The importance of Adrienne Clarkson and the Governor General in the contemporary period can be highlighted by a speech such would gave to the Empire and Canadian Clubs in Toronto, some two weeks before the end of her tenure:

> My Constitutional role has lain in what are called "reserve powers," making sure that there is a prime minister and government in place. To do so involves, at all times, the right "to encourage, to advice and to warn." Without revealing any secrets, I can tell you that I have done all three.[503]

Clearly, the Governor General does play an important political role in Canada although this is often behind the scenes.

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[499] Ibid.

[500] Naumetz, Tim. "Well-travelled Clarkson not just a figurehead: High expenses created controversy;" Edmonton Journal. Edmonton, Alta.: Aug 5, 2005. p. A.10

[501] Mills, Andrew. "Clarkson wanted polar trip defended. " The Vancouver Sun. Vancouver, B.C.: Oct 10, 2005. p. A.4

[502] Ibid.

[503] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005. p. 166

G. Michaëlle Jean

Amid political uncertainty, the decision to replace Adrienne Clarkson was delayed for at least a year. The decision was not made until, as Edward McWhinney notes, "Prime Minister Martin had concluded that the very real Constitutional dilemmas and doubts as to the scope of the discretionary reserve, prerogative powers of the Governor General in minority government crisis situations had been by now been sufficiently resolved, empirically."[504] However, Prime Minister Paul Martin's choice of Michaëlle Jean as Canada's 27th Governor General would cause considerable controversy almost immediately after her appointment was announced.

A Separatist Governor General?

After the announcement of Michaëlle Jean as the Governor General designate, allegations immediately arose that she was a separatist. First allegations arose that her filmmaker husband, Jean-Daniel Lafonde, was a supporter of the FLQ (*Front de libération du Québec*). Lafonde had befriended several FLQ members and even defended the theory that Pierre Laporte, the Quebec cabinet minister killed by the FLQ, as was in fact killed on orders by the federal government. As Lafonde would note in an interview in 1994, "Moreover, Pierre [his friend Pierre Vallières] was not alone with saying that: Jacques Ferron also believed that the federal powers-that-be had executed Laporte, to discredit the FLQ, which was extremely popular with the Quebec population until that point, and put blood on the hands of the separatists."[505] In the same interview, he contended that while some might find this theory insane, "But even in the most extreme cases of madness, there is always a small kernel of truth on which it is nevertheless advisable to reflect."[506] Ironically, this point of view caused Lafonde to be ostracized by many his former FLQ friends. It also became public that Lafonde did hire a former FLQ terrorist to build a bookcase in the family home.[507]

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[504] Ibid. p. 165

[505] Aubry, Jack. "Lafond defended writer who claimed RCMP killed Laporte. " The Ottawa Citizen. Ottawa, Ont.: Aug 13, 2005. p. A.1

[506] Ibid.

[507] Yaffe, Barbara. "Cloud lingers over Governor General. " Edmonton Journal. Edmonton, Alta.: Aug 21, 2005. pg. A.14

Lafonde's film, *La manière nègre* (The Negro Method), from 1991, was re-examined, specifically the scene in which Michaëlle Jean is seen with several well known separatists including Gerald Godin and her husband's friend Pierre Vallières, also a founding member of the FLQ, toasting independence.[508] When Vallières argues that the island of Martinique "should not only go for independence, but towards a revolution, like Quebec also," Jean replies, "In general! Yes, independence is not something that is given -- it is something that is taken."[509]

These questions over the political loyalties of the Governor General-designate caused considerable controversy. The Conservative MP for Nepean-Carleton wanted Jean to, "overtly renounce separatism or step down," as well as to disavow her French Citizenship and state how she voted in the 1995 Referendum.[510] Barbara Yaffe argued that when Paul Martin announced Jean's appointment,

> He certainly didn't anticipate that a closet door would be kicked wide open to expose questionable behaviour in relation to Jean and her husband's possible past support for Quebec separatists. This is the worst sort of doubt that can be raised about the couple. A Governor General and her consort must stand as a symbol of Canada. Michaëlle Jean will represent this nation's head of state (who for some reason resides in another country, but that's another story.) If there is a single qualification for someone in that position, it's that she/he be more Canadian in spirit and soul than the most patriotic beaver.[511]

Of course, the usual letters to the editors of newspapers began to flow with Robert O'Brien of Montreal noting, "If Jean becomes our new Governor General, the separatists and their sympathizers have, in effect, succeeded in achieving an almost complete nonviolent coup d'etat. What is there to celebrate in this obscene situation if you are a loyal Canadian?"[512]

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[508] Aubry, Jack. "New Gov. Gen. toasts Quebec sovereignty in film: Husband made documentary in the early 1990s. " Edmonton Journal. Edmonton, Alta.: Aug 16, 2005. p. A.1.

[509] Ibid.

[510] Aubry, Jack. "Senior Liberals defend G-G's husband: FLQ comments. " National Post. Don Mills, Ont.: Aug 13, 2005. pg. A.1

[511] Yaffe, Barbara . "Cloud lingers over Governor General. " Edmonton Journal. Edmonton, Alta.: Aug 21, 2005. pg. A.14

In response to these criticisms, Jean would note, "I want to tell you unequivocally that both my husband and I are proud to be Canadians and that we have the greatest respect for the institutions of our country. We are fully committed to Canada."[513] Jean would also add, "Let me be clear: we have never belonged to a political party or the separatist movement."[514]Paul Martin and his government would also defend Jean's appointment,

Nonetheless, concerns over the Governor Generals loyalty persisted. However, it would be the usual republican and King-liberals that would continue to complain about the past, it would include Canadians who have demonstrated a profound loyalty to the Crown: veterans. Initially, the Royal Canadian Legion had been opposed to Michaëlle Jean's appointment as Governor General, but it would change its policy noting in a statement issued September 12, 2005,

> Despite the national controversy that has arisen over the appointment of Madame Michaëlle Jean as the new Governor General of Canada, The Queen of Canada has now accepted Madame Jean as her representative. Thus The Royal Canadian Legion will loyally accept her decision. When Madame Jean is formally invested as Governor General the Legion will respectfully request that she serve as its Patron.[515]

While this may have been resolved at least officially, many veterans have maintained and will always maintain that Michaëlle Jean was not the appropriate choice for Governor General. Veterans operating outside the Royal Canadian Legion would protest Jean on Remembrance Day in 2005, by turning their backs on the Governor General. While many would condemn this action, others would defend them. For example, such as Navy Veteran Jim McGibbon said:

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[512] O'Brien, Robert . "Gov. Gen.'s nomination a victory for separatists. " Edmonton Journal. Edmonton, Alta.: Aug 23, 2005. pg. A.15

[513] Yaffe, Barbara . "Cloud lingers over Governor General. " Edmonton Journal. Edmonton, Alta.: Aug 21, 2005. pg. A.14

[514] Edmonton Journal. "Jean's declaration should set record straight. " Edmonton, Alta.: Aug 19, 2005. pg. A.16

[515] Royal Canadian Legions News Release September 12, 2005 http://www.legion.ca/asp/docs/news/Sept12_NR_05_e.asp

> It was claimed by the "opponents" of this group of so-called "rogue" veterans, that their protest to the presence of the Governor General at the ceremony would somehow spoil the observance and the Royal Canadian Legion claimed that it would be an offence to Her Majesty, the Queen as well as to the memory of our fallen soldiers. That is a crock of crud! If there was any offence, or any cheapening of the occasion, it was caused by the gross hypocritical presence of both Prime Paul Minister Martin and Governor General Michaëlle Jean.[516]

Clearly, the appointment of Jean was one of the most controversial and perhaps created far more heartache for the Prime Minister Martin than was initially envisioned.

During her inauguration, Jean would speak about the two solitudes, citing the need to deconstruct the "the spectre of all the solitudes" to instead formulate, "solidarity, respect, sharing ... a peaceful ideal of freedom and justice."[517] Jean trying to garner the support of the Royal Canadian Legion and the Canadian Forces pledged, "As Governor General, I shall place special emphasis on the generosity that Canadians have shown throughout our history, from our veterans and our Canadian Forces, who have often sacrificed so much, to the many volunteers in humanitarian actions, who often work in the shadows in the name of a peaceful ideal of freedom and justice."[518] The Edmonton Journal would argue in an editorial that, "Canada's new Governor General Michaëlle Jean was forthright and impassioned in her first speech. What a refreshing moment she gave Canadians."[519]

After the inauguration in large measure the controversy surrounding Jean had ceased; however questions continued to persist and Jean would argue that the attacks against her were deeply partisan,

> I think they were playing games with that. Yes. I think the idea was really to build an image of me that they knew would really frighten the rest of Canada, of course,

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[516] McGibbon, Jim. "Backing 'rogue' veterans. " Lindsay Daily Post. Lindsay, Ont.: Nov 22, 2005. p. A.4

[517] Hall, Anthony. "Moving beyond the Two Solitudes. " Edmonton Journal. Edmonton, Alta .:Nov 21, 2005. p. A18

[518] Ibid.

[519] Edmonton Journal. "Jean's vision refreshing." Edmonton, Alta.: Sep 28, 2005. p A.18

> of course. And unfortunately, since we don't know each other well, I think some people really fell into that kind of a trap. It was a very mean strategy.[520]

Many Canadians contested Jean's view. The appointment of Jean perhaps speaks to a desire for Prime Minister's in their appointment of vice-regals to highlight Canada's multi-culturalism.

The Alberta Trip

In May 2006, Governor General Michaëlle Jean would make her inaugural visit to Alberta as Governor General. This visit provoked much controversy. On May 5, 2006, Michaëlle Jean gave a speech to the Alberta Legislature, in which she implicitly criticized the selfishness of the Alberta government,

> Your people are among the most generous of Canadians, combined with those who volunteer their time, 94 per cent of your citizens believe in giving back. So Alberta's tremendous prosperity affords you the opportunity to make the most of this attitude of sharing. Surely a prime benefit to be derived from such communal wealth is the ability it gives us to ensure that no one is left behind and that each among us has a voice…The health and prosperity of every society is compromised by the people within it who suffer from poverty, who are disadvantaged by birth, who fight against discrimination… The marginalization of any human being is a loss to us all, and nothing in our affluent society is more disgraceful than our failure to nurture and support those who are most vulnerable [521]

The comments made by Jean were perhaps unusual. Governors General typically do not voice major concerns with policy direction to provincial governments. Graham Thomson, in his column, noted that these pleas of "sharing and caring was a gentle slap."[522] Thomson also noted her message was reminiscent of the late Alberta Lieutenant Governor Lois Hole:

> Her message was delivered just days after the Alberta government's flailing response to problems in long-term care facilities where our most senior, vulnerable citizens are arguably being left behind. And just last week the government failed to stem a growing tide of criticism over inadequate funding to

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[520] Samyn, Paul. "Governor General speaks candidly in first interview since installation. " Edmonton Journal. Edmonton, Alta.: Oct 15, 2005. p. A3

[521] Thomson, Graham. "Plea for sharing and caring was a gentle slap. " Edmonton Journal. Edmonton, Alta.: May 6, 2006. p. A19

[522] Ibid.

> Persons with Developmental Disabilities. And I couldn't help wondering if Jean's speech was also a sly attempt to wade into a controversy generated by some Alberta politicians who stubbornly insist on fighting against same-sex marriage.[523]

In her speech, Jean clearly ruffled some feathers, as was her intention, and reactions would be forthcoming in letters to the editor.

After her address to the Alberta Legislative Assembly, Jean met privately with Ralph Klein. The discussion would include topics such as Alberta separation and equalization payments. Klein would recount some of the discussion,

> I think she sees her role as helping to unify Canada and that's what we talked about…She asked me what our line in the sand would be ... relative to separation. She wants to know how prevalent it is here. While it's not prevalent right now, you know as well I do that there are some people out there who talk about separation. And I think it will be inflamed if we bring resource revenue into the equation.[524]

Jean was clearly concerned about separation in Alberta and wanted to gauge the provinces commitment to addressing these concerns. She also wanted to ensure that anxieties over equalization payments would not exacerbate separation sentiments. Canada's fascination with Quebec's separatist movement eclipses Alberta's own significant separatist movement, tightly linked with western alienation. Jean's discussion was also a reminder to Klein to act against separatist sentiment and perhaps not exploit in for political gain.

Jean's staff was probably not too happy that Klein had divulged the on goings of the private discussion. The Governor General's spokesperson Marilyne Guevremont refused to comment on the conversation noting, "That remains confidential. It's a private meeting and we don't comment."[525]However, many Albertans were not happy with Jean's comments.

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[523] Ibid.

[524] Olsen, Tom. "Klein, Jean discuss Alberta separation." Edmonton Journal. Edmonton, Alta.: May 5, 2006. p. A.3

[525] Ibid.

Many concerned Albertans wrote letters to the editor in the days following. On May 9, 2006 Bradley J Mole letter to the Edmonton Journal noted,

> Gov. Gen. Michaëlle Jean should review her job description. Being the Queen's representative in Canada does not include being this country's social conscience. Jean's suggestion as to how Alberta should spend its revenue is offensive. Attempting to influence public policy is not the job of this unelected political appointee. Jean and Canada's lieutenant-governors should be shown the door.[526]

Bradley J Mole had probably assumed the job description of the Governor General as provided by the myths he had consumed from the media. However, the vast executive powers provided by the Constitution Act, 1867 and the *Letters Patent*, 1947 and the prerogative powers juxtaposed by the very concept of a monarchical representative confirms exactly what Bradley J Mole denies: the ability of the Governor General to be the social and political conscience of Canada. David W. Lincoln also wrote a letter of editor, "Leave it to Michaëlle Jean, the current CBC refugee residing in Rideau Hall, to show the colours of who put her in the residence set aside for the Governor General."[527] Another letter to the Edmonton Journal by B.G Quinn needlessly brought up racial elements,

> So Michaëlle Jean thinks we should share our wealth beyond what we already are doing. Who was sharing with us in the 1980s when my husband and I both had to work part time and full time in order to pay the 22-per-cent interest rates? Who helped us with day care and kindergarten payments? Who, now, is helping my *white*, middle-class children with their university tuition?[528]

However, these conditions were not and are not unique to Albertans, even during the height of the economic collapse of Alberta in the 1980's, as alluded to by Quinn, it was arguably doing better than many of the other provinces. Ironically, the rest of Canada through the National Oil Policy (NOP) economically supported the development of Alberta's oil industry.[529] The Governor General was not merely espousing a more equitable distribution for wealth across Confederation, but a more equitable distribution of wealth for Albertans, perhaps something that Quinn would agree with given her want for subsidy of tuition costs.

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[526] Bradley J. Mole. "Jean's call to share wealth is inappropriate. " Edmonton Journal. Edmonton, Alta.: May 9, 2006. p. A19

[527] Lincoln, David W. "Alberta already shares its wealth. " Edmonton Journal. Edmonton, Alta.: May 8, 2006. p. A.15

[528] Quinn, B.G. "Who helped us?" [Edmonton Journal. Edmonton, Alta.: May 9, 2006. p. A19

[529] The National Oil Policy (NOP) implemented by the Diefenbaker government in 1961 as a result of the Borden Committee's recommendation in 1960 to support the western oil industry and ensure it became

However, not all the reaction to Jean's speech was negative. Ralph Klein, usually quick to criticize any federal officials, especially those of the Liberal variety, did not concur with the consternation over Jean's comments noting that the Governor General was "speaking in generalities."[530] Brian Mason, the leader of the NDP viewed the criticism as, "very appropriate and non-partisan."[531] G.A Teske claimed that ordinary Albertans shared her concerns and Alberta was not some homogeneous western-alienated construct,

> Kudos to gentle, gracious and well-grounded Gov. Gen. Michaëlle Jean! She speaks so well for so many of us. Her voice is heard, while our voices often seem soundless. What she said is so true. We are generous Albertans. But are we generous to those who are truly needy? It's too easy to ignore those who are marginalized, while we enjoy the fruits of a province blessed with lush natural resources. The characteristics of a quality life lived in Alberta should not be flaunted while we fail to "nurture and support those who are most vulnerable." I hope those in power have heard her message and not just her words. I think she speaks for many. I know she speaks for me.[532]

Other than this controversy as well as the initial controversy, Jean has been able to execute the Office of the Governor without much turmoil or controversy.

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more developed. The goal of the NOP was "to provide a market for Alberta and to provide revenue from which the oil-patch could fund further exploration and development. In other words, the Alberta petroleum industry was being subsidized with significant eastern Canadian monies, something that would be conveniently forgotten by Alberta during the NEP. Under this plan, the country would be split into two spheres, with the Ottawa Valley constituting the border. Those that lived east of the Ottawa Valley had to pay $1 to $1.50 per barrel above the world price for Albertan and other prairie oil. While those that lived east of the Ottawa Valley would rely on imported oil, primarily from Venezuela and would pay the world price. The historiography of the NOP is indicative of the hostility much of Canada felt toward it and should be examined and juxtaposed with the reaction to the National Energy Program. Jack Granatstein and Robert Bothwell note the consternation from Ontario on this matter "Ontario grumbled but it paid. "

[530] Thomson, Graham. "Plea for sharing and caring was a gentle slap. " Edmonton Journal. Edmonton, Alta.: May 6, 2006. p. A19

[531] Ibid.

[532] Teske, G.A. "Words of wisdom" Edmonton Journal. Edmonton, Alta.: May 9, 2006. p. A19

H. Preliminary Conclusions

The examination of modern precedents involving the interventions of Governors General in Canada clearly gives credence to the argument that they are relevant to contemporary politics. The reexamination of the Byng-King dispute quite clearly vindicates the Governor General. While myths supposedly limiting the powers of vice-regals resulted out of this dispute, vice-regals since this time have demonstrated that they are still free to exercise their discretion on political matters. Sometimes this discretion is not optional; it is required, as the Governor General exclusively holds many powers and authorities. These powers and authorities are sometimes beyond Constitutional convention. Roland Michener demonstrated this after the government of Lester B. Pearson was defeated on a vote of confidence. Under Constitutional convention, this should have automatically triggered an election or the resignation of the Cabinet. However, the vice-regal discretion, not Constitutional convention, proved supreme.

Edward Schreyer served as a proper check and balance on the Prime Minister. He would not automatically grant an election to Prime Minister Joe Clark after his government had been defeated. He also mused about forcing dissolution had Pierre Trudeau insisted upon patriating the Canadian Constitution unilaterally. Jeanne Sauvé would during her tenure publicly criticize Brian Mulroney and speak in favour of the Meech Lake Constitutional accords. Adrienne Clarkson would steward Canada during a time of war, scandal, and minority government. Throughout her tenure, there were clear opportunities for vice-regal intervention, especially after the 2004 election and with the start of the 38th Parliament when Stephen Harper was calling on the Governor General to intervene. Michaëlle Jean would also breach perceived vice-regal protocol by criticizing the policies of the provincial government on her first official visit to Alberta. To sum up, according to the myths surrounding vice-regal behaviour Governors General mentioned above were committing severe breaches. However, all these precedents demonstrate that there is no true set of rules or conventions that vice-regals must follow. Their job is to ensure the protection of Canadian society, the constitution and convention and there are almost no restrictions on how this is achieved.

Chapter VII. Lieutenant Governors in Canada: some Precedents of Intervention

Lieutenant Governors of Alberta

The examination of the Lieutenant Governors will focus mainly on Alberta. The reasons for this are several. Alberta has had a long history of interventionist Lieutenant Governors and has established many precedents regarding the role of the Lieutenant Governor. As Rand Dyck has written, "The role of the Lieutenant Governor has been rather controversial in Alberta on several occasions, especially in the first few year of the Social Credit regime."[533]The study of Lieutenant Governors in Alberta also may contradict those who argue that the Lieutenant Governor has no role in a stable political climate of majority governments. Alberta has arguably the most stable political climates in the Canada. The province has never known a minority government and yet, historically and contemporarily the Lieutenant Governor has played a necessary function. This is not to say that the role of the Lieutenant Governor is not important elsewhere in Canada. Rand Dyck has noted that: "The position of Lieutenant Governor is probably more significant in P.E.I than elsewhere, for this appointee is expected to be the focus of the social life in the province and may be called upon to officiate at any event, at any place, at any time."[534]

A. Lieutenant Governors in Alberta and early Social Credit: John Campbell Bowen and William Walsh.

The entrance of William Aberhart was a revolutionary time in Alberta. As Alvin Finkel has described, "in the view of present study, the early Social Credit movement was far more radical and diffuse that the monetary crank organization that scholars have depicted, although even the first Aberhart administration had its authoritarian and Conservative side."[535] As such, it required vigilance by the Lieutenant Governors of Alberta, along with the Governor General-in-Council. The efforts of William Walsh and John Bowen should be applauded. The Social Credit period in Alberta, especially between 1936 and 1938, required considerable intervention by the Lieutenant Governor and even the Governor General. In this same period, several precedents were established on the role and authority of the Governor General and the Lieutenant Governor.

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[533] Dyck, Rand. Provincial Politics in Canada: Towards The Turn of the Century. Prentice Hall Canada: Scarborough, 1996. p. 524

[534] Ibid. p. 100

[535] Finkel, Alvin. The Social Credit Phenomenon in Alberta University of Toronto Press: Toronto, 1989 p. 3

The Appointment of William Aberhart

The Social Credit era in Alberta is of course synonymous with that of William "Bible Bill" Aberhart. Aberhart was not the automatic choice as Premier with the Social Credit victory in 1935. Leslie A. Pal has noted that, "Aberhart did not even run in the 1935 election (like the UFA in 1921, Social Credit was elected as the government without a formal "leader."[536] After the election, the UFA Premier Robert G. Reid had tendered his resignation to the Lieutenant Governor, though this was not initially accepted. As Lieutenant Governor William Walsh would write to William Aberhart on August 24, 1935, "Hon. R.G Reid Premier of Alberta, has to-day tendered to me the resignation of himself and his Ministers and has recommended to me that I call upon you to form a new Government for this Province. I of course have not accepted this resignation nor will I do so until a new Government is ready to take office."[537] Walsh could not in good conscious follow the advice of his first minister and simply appoint Aberhart. The Lieutenant Governor noted to Aberhart, "the difficulty in the way of formally writing you to form a Government now lies in the fact that though you are the acknowledged leader of the Social Credit group outside of the Legislature you are not one of the members-elect of that body and I have nor official knowledge that leadership of the Social Credit group in the Assembly has been or will be conferred upon you by the members-elect of that group or that a seat in the Assembly will be made available for you."[538]

On September 3, 1935, Lieutenant Governor William Walsh commissioned William Aberhart as Premier, but only after, he had adhered to the vice-regal requests.[539] If Aberhart had not adhered to these requests in a timely manner, the Lieutenant

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[536] Tupper, Allan (ed.) Government and Politics in Alberta. University of Alberta Press: Edmonton, 1992. p. 14

[537] PAA 75.99/2 Lieutenant-Governor William Walsh Letter to William Aberhart August 24th, 1935

[538] Ibid.

[539] http://www.assembly.ab.ca/lao/library/PREMIERS/aberhart.htm

Governor would have been well within his rights to commission another Social Credit member as Premier.[540]

Walsh has concerns

Early into Aberhart's term, the Lieutenant Governor was already expressing concerns with some of Aberhart's Legislation. On March 31, 1936, in a letter to Premier William Aberhart Walsh noted, "I have a very great objection on principle to the enactment by order-in-council of legislation which should be enacted by statute."[541] Walsh's concern was with Section 6 a) of the *Social Credit Measures Act*,

> 6. The Lieutenant Governor-in-Council is hereby authorized and empowered:
>
> a) to adopt and to put into operation any measure designed to facilitate the exchange of goods and services or any proposal which is calculated to bring about the equation of consumption to production to ensure to the people of the Province the full benefit of the increment arising from their association.

Walsh continued noting "I think that such legislation should be enacted only after full discussion in the open forum of the legislature by those elected for that purposes rather than in the Executive Council chamber by a few of those so elected."[542] Lieutenant Governor Walsh gave Aberhart an ultimatum: change the provisions of the act or provide legal counsel to determine whether "this section is within the legislative competence of the Legislature so that I may be able to decide whether or not I should give my assent to the Act with this section made operative upon the giving of such assent."[543]It is clear that Walsh was merely being polite as he had served as the former Chief Justice of Alberta and was well versed in the law.[544]

Several months later Walsh would again express concern and threaten intervention. On August 31, 1936, William Walsh wrote to Premier William Aberhart deeply concerned with the *Act relating to the reduction and settlement of debts,* which had similar elements to the bills that would follow in 1937.[545] In the letter, Walsh noted sympathy for the difficulties of the Aberhart government, but also intimated his objections, "I cannot too strongly condemn the ruthless fashion in which the Act proposes to deal with the rights of creditors…surely creditors have some rights in this country as well as debtors."[546] Walsh would note that such legislation would further batter Alberta's damaged financial reputation. Walsh also warned that such legislation was perhaps beyond the scope and authority of the Alberta Legislature as it infringes on the exclusive banking jurisdiction of the Dominion government. It would thereby be possible that the Dominion government would disallow the legislation. Therefore, Walsh provided Aberhart with three options. The first one was to delay the passing of the bill until the conclusion of the next session. During the session, the bill could be properly debated or amended. The second option was send the legislation for review by the Supreme Court of Alberta as provided by Chapter 89 of the Revised Statutes. Walsh had noted, "It seems to be infinitely preferable that its validity should be determined at the outset rather than after its unsettling effect has created what I fear may be a state of havoc amongst those affected by it."[547] The third option provided by Walsh was for Aberhart to do nothing. In this event Walsh casually mentioned, "I have the power under section 55 of the British North America Act which is by section 90 of that Act extended and applied to the Legislature of the Provinces to reserve this bill for the signification of the *Governors General* pleasure."[548] Walsh noted that, "If however I find that I can constitutionally do so I will feel myself quite justified in reserving it."[549] Walsh made it very clear that Aberhart could share the letter with his government. However, the letter was not intended to be made public, as Walsh felt the Lieutenant Governor should operate "behind the scenes."[550] Walsh decided in the end against refusing Royal Assent.

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[540] Aberhart would not obtain a seat in the Assembly until November 3, 1935 when he won by acclamation in the riding of Okotoks-High River.

[541] PAA 69.281 1038 Microfiche Lieutenant Governor William Walsh Letter to William Aberhart

[542] Ibid.

[543] Ibid.

[544] It is interesting that the vice-regal concerns with orders-in-council in Alberta would persist some 60 years later.

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[545] Walsh conveyed elegance in his letter with Aberhart, praising his desires to unburden poverty-stricken Albertans, but noting shortcomings of the legislation and potentials that would be detrimental to not only his government but also the province. Walsh provided options and advice all the while never presuming to judge Aberhart too harshly or personally blame him or his government for Alberta's troubles. This nuanced approach would be perhaps missed by both King and Bowen in the Constitutional Crisis of 1937.

[546] PAA 69.289 1038 Microfiche Lieutenant-Governor William Walsh Letter to Premier William Aberhart August 31, 1936 p. 2

[547] Ibid.

[548] Ibid. p. 3-4

[549] Ibid. p. 4

[550] Ibid.

However, the Supreme Court of Alberta did review this legislation, renamed the *Reduction and Settlement of Debts Act*. It is highly possible that Walsh played a role in alerting the courts over it unconstitutionality, as a former Chief Justice of the province and one so concerned with the legislation he most likely made a well-placed call to the proper authority but did so "behind the scenes."

In February 1937, Mr. Justice A.F Ewing of the Supreme Court of Alberta found that the *Reduction and Settlement of Debts Act* was unconstitutional.[551] During on May 20-21, the provincial government appealed to the Alberta Appellate Division. On June 4, the court upheld the earlier decision.[552] On October 25, 1938, the Aberhart government would again appeal to the Appellate Division, but the court refused the application.[553] By 1937, the regularity of unconstitutional bills passed by the Alberta legislature made it necessary for some other form of intervention. That course could have quite possibly overwhelmed the court system reviewing legislation in question and the appeals that would undoubtedly follow. Some other course of action was necessary. This would require both the intervention of Alberta's Lieutenant Governor and Canada's Governor General.

Bowen and Aberhart: Disallowance and Reservation

Alberta's longest serving Lieutenant Governor John Campbell Bowen would challenge several misconceptions of the post of Lieutenant Governor. His tenure would illustrate that the Lieutenant Governor was relevant in ensuring the protection of civil liberties and ensuring legislation passed in the Alberta Legislative Assembly was within the Constitution. However, this insight and guardianship did not come readily, as some of his contemporary supporters would think. Even during the Constitutional Crisis of 1937-38, Bowen demonstrated a weakness that was unbecoming of a Lieutenant Governor. Mackenzie King would note in his diary on February 1, 1938: "…had conservation with the Lieutenant Governor Bowen of Alberta who impressed me as a very delicate man, and not altogether suited for the post he occupies. Good meaning but lacking in presence and in knowledge of affairs."[554] Nonetheless, he was largely able to overcome this.

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[551] The Canadian Annual Review of Public Affairs. Toronto : Annual Review Pub. Co p 1938 p. 476
[552] Ibid.
[553] Ibid.

J.R Mallory has written that, "When William Aberhart assumed office as premier of Alberta in 1935 he asked for eighteen months to establish a new order which would free the people from their economic ills."[555]By 1937, it was clear that Aberhart had failed to do so. Meanwhile, there was concern over Aberhart's activities and legislation. On August 16, 1937, Arthur Meighen wrote to Senator William Griesbach, foreshadowing the intervention of the Federal government and the Lieutenant Governor, "What cannot be forgotten is that the people of Alberta are still citizens of Canada and they are still entitled to the safeguards of our Constitution. If Provincial legislation is always to be allowed to go unless upset by the courts, then the very sheet anchor of Confederation is gone."[556]

In August 1937, William Aberhart, eager to implement a social credit economic order in Alberta, would pass through the legislature the *Credit of Alberta Regulation Act*, the *Bank Employees Civil Rights Act* and the *Judicature Act Amendment Act*. In a letter on August 11, Mackenzie King had first requested that William Aberhart send the legislation for review to the Supreme Court of Canada to judge its constitutionality. Having already received Royal Assent from the Lieutenant Governor for the legislation in question on August 10, Aberhart refused this request.[557]

There were some major concerns with the legislation even to the extent that the Lieutenant Governor should not have granted Royal Assent. For instance, the *Credit of Regulation Act* Section 7 stated that any banker "…while unlicensed, be capable of commencing or maintaining any action...in respect to any claim, in law or equity." [558] *The Judicature Act Amendment Act* would absurdly propose what was tantamount to an unilateral Constitutional amendment, "No action or proceeding of any nature whatsoever concerning the Constitutional validity of any enactment of this Legislative Assembly of the Province shall be commenced, maintained, continued or defended, unless and until permission…has first been given by the Lieutenant Governor in Council."[559] The *Bank Employees Civil Rights Act* as described by J.R Mallory, "denied civil rights to any unlicensed employees of a chartered bank."[560]It is debatable whether William Walsh would have given Royal Assent to these three bills.

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[554] Mackenzie King Diaries. Tuesday February 1, 1938 p. 109

[555] Mallory, J.R. "Disallowance and the Nation Interest: The Alberta Social Credit Legislation of 1937," The Canadian Journal of Economics and Political Science., Vol. 14, No.3 August 1948 p. 344

[556] Arthur Meighen letter to William Griesbach August 16, 1937 Edmonton Archives MS 209 F 284

[557] Mallory, J.R. "Disallowance and the Nation Interest: The Alberta Social Credit Legislation of 1937," The Canadian Journal of Economics and Political Science., Vol. 14, No.3 August 1948 p. 349

[558] *Credit of Regulation Act* Section 7

However, Bowen decided not to refuse Royal Assent during the August 1937 Session. While the failure to intervene would demonstrate some weakness in Lieutenant Governor John C. Bowen, the subsequent federal disallowance would certainly provide an awakening of his guardianship of the Canadian Constitution. Afterward, Bowen would be very careful on granting Royal Assent. He would also seek counsel independent of Aberhart and his Social Credit Government. Nonetheless, he arguably should have intervened in August 1937.

This is not to say that Lieutenant Governor Bowen did not have concerns about the legislation passed in the August Session 1937. In fact, on the last day of session, August 6, Bowen had called on Premier William Aberhart and the Attorney General John Hugill to discuss the constitutionality of the legislation. In a rather bizarre scenario, the Attorney General viewed some of the legislation unconstitutional and advised refusal of Royal Assent. As Hugill would later describe in a letter to Aberhart over the events, "On the afternoon of Friday, August 6th, 1937 shortly before the special session prorogued I went with you for audience with Lieutenant Governor in his room at his request. There I had the temerity to differ with the opinion you gave of the competence of our Provincial Legislature to enact certain Bills then awaiting His Honour's pleasure and upon which he sought our advice."[561] A shocked Aberhart tried to convince the Lieutenant Governor this was not so, even though he had no legal experience or qualifications. Upon leaving the Lieutenant Governor's suite Aberhart informed Hugill that he would no longer serve as

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[559] *The Judicature Act Amendment Act*

[560] Mallory, J.R. "Disallowance and the Nation Interest: The Alberta Social Credit Legislation of 1937," The Canadian Journal of Economics and Political Science., Vol. 14, No.3 August 1948 p. 349

[561] Watkins, Ernest. The Golden Province Political Alberta. Sandstone Publishing: Calgary, 1980. p. 126

Attorney General.[562] Even more shocking was that the Lieutenant Governor granted Royal Assent to the *Credit of Alberta Regulation Act*, the *Bank Employees Civil Rights Act* and the *Judicature Act Amendment Act*, especially after the Attorney General expressed concern.

As foreshadowed the earlier year by Walsh, who noted that Constitutional excess by Alberta that infringed on the established Dominion Constitutional divisions of powers would result in disallowance by the Governor General-in-Council. This occurred on August 17, 1937 when the *Credit of Alberta Regulation Act*, the *Bank Employees Civil Rights Act* and the *Judicature Act Amendment Act* was disallowed by the Governor General-in-Council. Ernest Lapointe the Federal Justice Minister noted in the House of Commons, "The statutes of Alberta in question constitute an unmistakeable invasion of the legislative field thus assigned to Parliament. They conflict with the dominion laws and virtually supplant dominion institutions designed by Parliament to facilitate the trade and commerce of the whole dominion."[563] Aberhart refused to publish the disallowance in the *Alberta Gazette,* as was required, so the federal government published the disallowance of these provincial acts in the *Canada Gazette*.

In response to the bills disallowed by the Dominion Government James Mackinnon, the Liberal MP for Edmonton West, and the only Liberal MP in Alberta, proposed a course of action for the Lieutenant Governor in September 1937. If Aberhart were to re-introduce the bills in the Legislative Assembly for the fall session, the Lieutenant Government should refuse Royal Assent. In the event that Aberhart asked for a dissolution with the intent of making the federal interference an election issue, the Lieutenant Governor should refuse the request instead commissioning the provincial Liberal Leader E.L Gray as Premier.[564] Lieutenant Governor Bowen conveyed this plan to the federal government as Mackenzie King would note in his diary on September 28, 1937, "The Lt.Gov Bowen had written Lapointe indicating he might refuse dissolution if requested and possibly form a new ministry-a mad course- some time taken on miscellaneous matters."[565]

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[562] Ibid.
[563] Canada, House of Commons. *Debates*, 1938, p. 178
[564] Ward, Norman. "William Aberhart in the Year of the Tiger." The Dalhousie Review Vol. 54, No. 3 p. 476

The Federal Justice Minister Ernest Lapointe had warned Lieutenant Governor John Bowen that Aberhart might want to reintroduce legislation in the fall session. Elements of the disallowed legislation were reintroduced in legislation for the fall session. In addition, some of the new legislation included other unconstitutional elements. These were apparent in the *Bank Taxation Act, an Act to amend the Credit of Alberta Regulation Act* and the *Act to ensure the publication of accurate news and information.*[566] The *Bank Taxation Act* would allow the province, "to levy taxes of one-half per cent per annum on all paid-up capital of the banks and one per cent per annum on their reserve funds and undivided profits."[567] The recently disallowed *Credit of Alberta Regulation Act* was "rewritten to drop all reference to the banks and substitute the words 'credit institutions.' All such credit institutions were to come under the direction of the Social Credit Board."[568]The *Act to ensure the publication of accurate news and information* was described by David Raymond Elliot,

> The Accurate News and Information Act required that every Alberta newspaper publish any statements furnished by the chairman of the Social Credit "which has for its objective the correction or amplification of any statement relating to any policy or activity of the Government of the Province." The bill further directed that newspapers could be ordered to reveal in writing all sources of their information and the names and addresses of such sources… [as well as] writers of any editorial, articles, or news item appearing in their papers. Failure to abide by this ruling would result in the prohibition of the publication of said newspaper, the prohibition of anything written by an offending writer and the prohibition of the publication of any information emanating from any offending person or source.[569]

With the looming prospect of war against fascism, it became clear that Alberta was heading a fascist course itself, at least with respect to press laws.

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[565] Mackenzie King Diaries. Tuesday September 28, 1937 p. 592

[566] Also known as *The Accurate News and Information Act*

[567] Elliot, David Raymond. Bible Bill: a biography of William Aberhart. Reidmore Books: Edmonton, 1987. p. 272-3

[568] Ibid. p. 273

[569] Ibid. 272

With respect to this legislation, there was concern in Ottawa and Alberta, as Mackenzie King would note in his diary: "many orders on much discussion on Alberta situation."[570] However, there was not unanimity in cabinet as to a reaction, as some Liberals, noted by King as Mackenzie, Rogers Power and Gardiner, thought that the legislation rather than being disallowed should be allowed to pass. [571] The Banks themselves could challenge the legislation afterwards in the courts. King noted however, that as Liberals, they must uphold the constitution.[572] However, there was one solution proposed that was adopted by the Cabinet, "…finally council adopted unanimous view which Lapointe had expressed and which strongly endorsed that the Lieutenant Governor should reserve any such legislation."[573] It was clear that the Lieutenant Governor was already onboard.

On October 1, 1937, Lieutenant Governor John Bowen wrote to William Aberhart with respect to *Bill 8* (*An Act to Amend and Consolidate the Credit of Alberta Regulation Act*). Bowen noted, "As Attorney General and one who is not versed in the Law, you could hardly be expected to give me legal advice, therefore I am asking that you be good enough to appoint an independent solicitor to review the said Bill for my information. In this respect I would suggest that you ask Mr Sidney B. Woods to do this for me."[574] Woods' daughter would later recall Lieutenant Governor Bowen coming to her home to talk with her father with respect to the three bills.[575] The provincial government had refused to provide the Lieutenant Governor with independent counsel so he had to seek advice from Sidney Woods as to his assent. On October 6, 1937, the Lieutenant Governor announced the reservation of the *Bank Taxation Act*, *An Act to amend the Credit of Alberta Regulation Act* and the *Act to ensure the publication of accurate news and information* for the Governor General-in-Council who sent the bills on to the Supreme Court for review. Cox states that this situation was perhaps unique, "How often has the authority of the Crown, though the offices of a Governor General or Lieutenant

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[570] Mackenzie King Diaries. Tuesday September 28, 1937 p. 592
[571] King refers to Cabinet as Council in his diaries
[572] Mackenzie King Diaries. Tuesday September 28, 1937 p. 592
[573] Ibid.
[574]PAA 68.289 Microfiche Lieutenant-Governor Bowen letter to Premier William Aberhart October 1, 1937
[575] Cox, Elizabeth M. "The Crown and Social Credit." Alberta History. Summer 1992. p, 26

Governor, been used in Canada to delay legislation while its legality was being established by the Supreme Court?"[576]

The influence of the Federal government and even the Governor General is clear with respect to this reservation. On October 9, 1937, Mackenzie King meet with His Excellency Lord Tweedsmuir and after gossiping about the ex-King Edward VIII, they settled into the matter of the Alberta Legislation and as Mackenzie King recounted in his diary,

> He asked me as to whether I had advised Bowen of Alberta re reserving bills. I told him of what he had written Lapointe and what I had advised Lapointe to do, having to dissuade him from the wrong course [of wanting to dismiss Aberhart]…[Bowen had] proposed in discussing his position and leaving it to him to withhold or pass as he might wish.[577]

It is clear that the Governor General Lord Tweedsmuir did not have any objections to this course of action. While the federal government did provide support to Bowen, they did not force Bowen to reserve the legislation. Bowen was quite happy to do so, even proposing to dismiss Aberhart if necessary, a prospect that the Prime Minister was extremely uncomfortable with.

On March 4, 1938, the Supreme Court of Canada ruled on the *Alberta Social Credit Act*, *Taxation of Banks Act* (Alta.) and the *Act to Ensure the Publication of Accurate Laws and Information* and determined that all three were in fact *ultra vires*. The Supreme Court would note with respect to the Alberta Social Credit Act, "…the machinery it professes to constitute cannot come into operation; hence the Credit of Alberta Regulation Act, 1937, is inoperative and *ultra vires* as ancillary and dependent legislation, and part of the general scheme of Social Credit. It is *ultra vires* on the broader ground that it is legislation in relation to banking and trade and commerce."[578] The Supreme Court ruled with respect to the *Taxation of Banks Act (Alta.)*, "…though in form a taxing statute, is directed to the frustration of the system of banking established by the Bank Act and to controlling banks in the conduct of their business, which purpose and effect are *ultra vires* of the Legislature of Alberta which cannot use its special powers as an indirect means of destroying powers given by the Parliament of Canada."[579] The Supreme Court found the *Act to Ensure the Publication of Accurate Laws* to be,

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[576] Ibid. p, 25

[577] Mackenzie King Diaries. October 8, 1937. p. 2

[578] SCR 100 1938 2 D.L.R. p. 82

> ...ancillary to and dependent upon the Social Credit Act which is outside the powers conferred on the Provinces. Even considered as an independent enactment, it would be beyond the capacity of the Alberta Legislature under s. 129 of the B.N.A. Act to curtail the right of public discussion existent at the time of the enactment of the B.N.A. Act or to reduce the political rights of its citizens as compared with those of other Provinces or to interfere with the workings of Parliamentary institutions as contemplated by the B.N.A. Act and Dominion statutes.[580]

The question of the *Alberta Social Credit Act*, *Taxation of Banks Act* (Alta.) and the *Act to Ensure the Publication of Accurate Laws and Information* had still not been completely determined and would not be until 1938. Aberhart had appealed the decision of the Supreme Court of Canada to Canada's highest legal authority at the time, the Judicial Committee of the Privy Council (JCPC), in Westminster, London. On July 7, 1938, the JCPC would render its decision and uphold the ruling made by the Supreme Court of Canada.

The Aberhart government would also challenge the authority of the Governor General-in-Council to disallow legislation and the Lieutenant Governor to reserve legislation. On September 30, the Aberhart referred the question of disallowance to the Supreme Court of Canada. On October 2, the federal government accepted this referral.[581] On March 4, 1938, the Supreme Court rule on *Reference RE Power of Disallowance and Power of Reservation* finding that the power of reservation and disallowance was "subject to no limitation or restriction."[582]

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[579] Ibid.

[580] Ibid.

[581] Mallory, J.R. "Disallowance and the Nation Interest: The Alberta Social Credit Legislation of 1937." The Canadian Journal of Economics and Political Science., Vol. 14, No.3 August 1948 p. 351

[582] S.C.R. 71, [1938] 2 D.L.R. 8

The near dismissal of Aberhart

Meanwhile, Aberhart was deeply upset at the Lieutenant Governor and quite publicly swore revenge. This vengeful attitude nearly provoked another Constitutional Crisis. Lieutenant Governor Bowen and Premier Aberhart confronted each other again in the spring of 1938 over the closing Lieutenant Governor's residence: Government House. Some have judged that this confrontation was simply a continuation or retaliation for the Lieutenant Governor's actions in reserving legislation during the fall of 1937.

The idea to close Government House had its origins in a grass-root Social Credit movement, which began at the Constituency Association level. This grass roots movement of Social Credit angered by the 'interference' of the Lieutenant Governor demanded Bowen's resignation. As noted by the Edmonton Journal on November 25, 1937, the Vegreville constituency Social Credit association would resolve that the Lieutenant Governor "present his resignation."[583] When it became apparent, the Lieutenant Governor would not resign the grass roots of the Social Credit Party resolved to close down his residence at Government House.

In March 1938, the committee of supply of the Alberta Legislature voted not to grant funds for Government House effective March 31, 1938. The Aberhart government took "unequivocal action and eliminated all grants for its upkeep. Government House, as the press widely reported, was to be closed. Unfortunately, nobody thought to tell the Lieutenant Governor, who presumably had no more reason than anybody else to believe what he read in the papers, and he remained in occupation."[584] The Lieutenant Governor continued to live at Government House and the government continued to fund Government House for the month of April through a special warrant signed by the Lieutenant Governor.[585] By the end of April, there was a more confrontational tone. The Lieutenant Governor was informed late Saturday April 29th that he would have to vacate Government House by May 3.[586] The Lieutenant Governor refused to leave without an order-in-council. Aberhart argued that an order-in-council was not necessary. Since a standoff existed, Aberhart sought to further pressure Bowen to leaving by cutting of the utilities to the building and firing the staff.[587] As well, protestors came to Government House. Other concerned citizens and Aberhart supporters wrote letters to the Lieutenant Governor attacking him. Bowen's wife described this time as "frightening."[588] The Lieutenant Governor would eventually concede defeat signing the order-in-council on May 6 and left Government House on May 9th.[589] However, the crisis was not over.

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[583] "Ask Resignation of Hon J.C Bowen" Edmonton Journal. November 25, 1937 (accessed from Alberta Legislature Microfilm-Lieutenant Governor-1937)

[584] Ward, Norman. William Aberhart in the Year of the Tiger. The Dalhousie Review Vol. 54, No. 3 p. 477

[585] Munro, Ken. The Maple Crown in Alberta: The Office of Lieutenant Governor 1905-2005. Trafford: Victoria, 2005 p. 61

Bowen publicly humiliated sought a course of action that would ensure that he had the last word. As Norman Ward has noted,

> Publicly, Bowen did not challenge the government's right to dispossess him, claiming only that it must be done in the right way. Privately he was so upset that he had to take to his bed, where he brooded over possible courses of action. Deprived of even a secretary, he considered the humiliation of his office; "he feels", a faithful correspondent (and Liberal organizer) reported on May 14 to James, "that the Kings' representative has been insulted to a point that might lead to grave consequences if allowed to go unchallenged."[590]

The closing of Government House and the denial of administrative and other support by Aberhart angered the Lieutenant Governor. The Lieutenant Governor began to implement an accelerated version of the Mackinnon plan proposed in September 1937. Bowen approached E.L Grey, who would note,

> When I was first approached I was opposed to the idea. This situation is, however, so serious that I am inclined to believe it is my duty to step in. I feel that if something drastic is not done the Social Credit forces may have a solid western block in the very near future.[591]

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[586] Ibid. p. 62
[587] Ibid.
[588] Ibid. p. 63
[589] Edmonton Bulletin May 4, 1938 p 1 & 2
[590] Ward, Norman. William Aberhart in the Year of the Tiger. The Dalhousie Review Vol. 54, No. 3 p. 477
[591] Ibid. p. 478

The removal of Aberhart and the end of Social Credit in Alberta seemed imminent. The Lieutenant Governor would forcibly remove the Premier from office.

However, this plan reached the ears of the Prime Minister Mackenzie King via his provincial Liberal Lieutenants and even Grey the Alberta Liberal Leader, who sought his advice on the matter. On May 19, 1938, King noted in his diary,

> Mr. Gardiner and Mr. Mackinnon came to the office to talk over the Alberta situation before going to Council. The present Lieutenant Governor wants to dismiss the Alberta ministry, and has asked Grey to form a ministry which is to be one composed of the different political parties of the Province. It is sheer madness. Action of the kind would almost certainly have repercussions in Saskatchewan which would cause the Liberals the election there, and might bring on a sort of civil war in Alberta. I had Gardiner 'phone Gray and MacKinnon 'phoned the Governor.[592]

The dismissal was averted as Mackenzie King convinced, but not forced, the Lieutenant Governor to consider another course of action. Norman Ward has argued that, "his near dismissal [of William Aberhart] was not a partisan matter, in which an unprincipled representative of the monarch sought to rid himself of a premier whose views he considered dangerous. Nor was it in essence the product of a Constitutional impasse which required the opening of a rarely used safety valve..."[593] Aberhart was nearly dismissed for his closure of Government House, the residence of the Lieutenant Governor, not because of a constitutional impasse.[594]

Ceremonial affronts to vice-regals rightly or wrongly can have serious political consequences, as arrogant politicians are liable to forget that they do not exercise power they merely grant advice to Her Majesty's representative. The Bowen example serves as a powerful example that no vice-regal should be ostracized. It also illustrates the tremendous power of a Lieutenant Governor. While some may argue that this incident may have been an abuse of the Lieutenant Governor's power, this may be true, but such action would not violate the written laws of the Constitution. Had his plan to dismiss

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[592] Mackenzie King Diary May 19, 1938 p. 271

[593] Arguably, Bowen could have dismissed Aberhart in the spring of 1937 after a caucus revolt.

[594] Ward, Norman. "William Aberhart in the Year of the Tiger." The Dalhousie Review Vol. 54, No. 3 p. 475

Aberhart been implemented it would have been subject to no recourse, although the Lieutenant Governor might have found himself dismissed by the Governor General on the advice of Prime Minister Mackenzie King. King thought that any intervention would damage the chances of the provincial Liberals in the 1938 elections in Saskatchewan. Mackenzie King was not sympathetic to Aberhart, as he had noted in diary in 1935, "my feeling is that Aberhart should be hanged. His action has been bribery and corruption."[595]

Lieutenant Governor John Campbell Bowen would serve as an example to his successors. On May 3, 1951, his successor John Bowlen received a curious piece of correspondence from the Privy Council, perhaps indicative that the Lieutenant Governor was concerned with legislation passed in Alberta, [596]

> The Committee of the Privy Council have had before them a report dated 28th April 1951, from the Minister of Justice, stating that, with the assistance of the Legal Officers of his Department he has examined Bills of the Province of Alberta numbered 1 to 4, 6 to 76, 78 to 86, passed during the Session of the Eleventh Legislature of Alberta held in the year 1950 and received by the Secretary of State of Canada on the 6th day of May, 1950, and that he is of opinion that these Bills may be left to such operation as they may have.[597]

This tradition of vigilance shown by Bowen is not merely an academic anachronism. It is a lasting part of Alberta's political memory recounted in the contemporary era rather frequently in the media, especially the Edmonton Journal. It is also part of a legacy continued by Alberta Lieutenant Governors Ralph Steinhauer, Gordon Towers, Bud Olsen, Lois Hole and even Norman Kwong.

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[595] Mackenzie King Diaries October 1, 1935

[596] Bowlen is easily confused with Bowen as some in the media have not realized that these were two different people.

[597] PAA 69.289 1670 Microfiche Privy Council Meeting Minute p. C 2156 May 3, 1951.

B. Ralph Steinhauer

Ruffling a few feathers

Throughout his tenure, Ralph Steinhauer, Alberta's first Aboriginal Lieutenant Governor, championed native rights in the province at the expense of the policies of Premier Peter Lougheed. For instance, on August 12, 1975, Steinhauer wrote a letter to Professor K. J Laidler of the University of Ottawa concerning a Canadian Conference address the Lieutenant Governor would be giving,

> Attached is a copy of my paper entitled "The Canadian Heritage: A Native's point of View." I should like an honest opinion on this paper as there is a possibility that it might 'ruffle a few feathers. These are my feelings on the subject.[598]

In October 1976, Steinhauer gave another controversial speech at the University of Calgary. In fact, the speech could be described as a rant on the injustices of native people both past and contemporary. As Patricia Halligan, the Lieutenant Governor's private secretary would respond to requests for the speech, "Unfortunately, His Honour did not have a prepared text but spoke freely without notes. You could possibly check with the University to see if they taped His Honour's remarks."[599] In his speech Steinhauer had discussed the possibility of refusing assent to legislation that would be detrimental to native rights and interests. As the Edmonton Journal said "…he [Steinhauer] declined to rule out the possibility that he would refuse to sign native affairs legislation he disagreed with."[600] Steinhauer also described the frustrations of being an aboriginal Lieutenant Governor, "It [native affairs] has become a hot political issue but my lips now must be officially sealed on political questions-although sometimes I feel like I am going to blow up."[601] Nonetheless, Steinhauer felt as Canada's first aboriginal Lieutenant Governor a responsibility to "depart from the traditional political neutrality."[602] Steinhauer also seemed aware that his outspoken behaviour might cost him his job, "If I get too controversial, I suppose they will be looking for a new Lieutenant Governor."[603]

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[598] PAA 79.338 A-2 Lieutenant Governor Ralph Steinhauer Letter to Professor K. J Laidler August 12th, 1975

[599] PAA 79.338 A-2 Patricia Halligan Letter to Lita Boudreay, Department of Indian and Northern Affairs October 15th, 1974

[600] Edmonton Journal. Interference Charged in Steinhauer's role. Edmonton Journal. April 22, 1977

[601] Davies, Jim Edmonton Journal July 12, 1976 (accessed from Alberta Legislature Library Microfiche-Lieutenant Governor 1976)

[602] Ibid.

The London Trip

In July 1976 several Alberta native chiefs and Lieutenant Governor Ralph Steinhauer would travel to Buckingham Palace to meet with the Queen to commemorate the signing of Treaties 6 and 7. The whole trip was the brainchild of Lieutenant Governor Ralph Steinhauer who convinced Peter Lougheed to support and finance the trip. However, before the trip could begin Steinhauer first had to convince the Governor General to grant permission, "it is the wish of the native people that a representative deputation of Chiefs…should visit the United Kingdom."[604] Although, the Queen was expected to travel to Canada in 1977, Steinhauer argued, "Alberta's Indians attach special significance to their being able to travel to visit her in her own home."[605] Steinhauer promised to ensure the occasion would be "intentionally non-political."[606]Before permission would be given, Esmond Butler, the private Secretary to the Governor General, would note that permission was conditional. The Governor General and the federal government wanted assurance that the visit to England would not be a political event "to draw attention to problems which are of concern to the Indian people of this country."[607] Only after Steinhauer gave assurances was the visit approved. However, Steinhauer was disingenuous in his committal and once in England and in the presence of Her Majesty; he would do what he was clearly told not to: raise the problems of the natives in Canada.

When he returned to Edmonton, Steinhauer would recount his actions in London through a sympathetic article written by Jim Davies of the Edmonton Journal:

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[603] Ibid.
[604] PAA 87.265 J-2Ralph Steinhauer Letter to Governor-General Léger, Jules November 27th 1975
[605] Ibid.
[606] Ibid.
[607] Smith, David E. The Invisible Crown: The First Principle of Canadian Government. University of Toronto Press, Toronto, 1995 p. 55

> I was just stating facts. Because of the Indian Act, aren't we wards of the government? Isn't that a fact? You should read the act. Just about every clause begins 'With the consent of the governor-in-council the Indians shall…'[608]

Steinhauer, however, did not view it as an incongruity for a Lieutenant Governor to speak out politically, "The Queen has the right to speak out. If I'm the representative of the Queen here, I have the same privilege."[609] Steinhauer would also detail his philosophy on the role of the Lieutenant Governor. Having no regrets at all over his comments made in London Steinhauer would not make apologies, "The truth has got to come out. When you state facts, things come out that aren't that pleasant to the ears of government."[610]

Pondering refusal of assent

Another native concern that would come to a head was the amendments made to the *Land Titles Act*. As the Calgary Albertan reported on April 18, 1977, the new *Land Titles Act* was aimed at,

> …blocking any attempt by Alberta Indians to declare an interest in land in the northern area of the province, including the Athabasca oil sands. A caveat declaring an interest in the lands was filed by some Indian bands in 1975 and a court hearing is due to be held. The provincial government, worried by comments made when the Supreme Court of Canada ruled on a similar point recently, rushed in with amendments to plug any possible loopholes that might favour the Indian case.[611]

The Supreme Court decision in question was the Paulette Caveat Case in the Northwest Territories, which concerned the Alberta government to the extent that the Attorney General of Alberta petitioned the court to intervene. This petition was later denied by the Supreme Court.

The proposed *Bill 29*, the *Land Title Amendment Act* would place restrictions on the filing caveats on Crown land, at the time a frequent tool used by native groups in securing land claims. The use of caveats was "an attempt to forbid registration of any person as Transferee of ownership of, or of any instrument affecting the said estate or interest."[612] Native groups could file a caveat preventing the development or sale of land until their land claim challenges would be resolved. The most disconcerting caveat in the eyes of the provincial government was the Syncrude or Whitehead Caveat as this had the potential to not only delay some Oil Sands projects but also transfer the ownership of the land from the Crown to natives. This ownership included the mineral and surface rights as guaranteed by treaty. Because of the proposed legislative changes, Lieutenant Governor Steinhauer spoke against the legislation and hinted that he was considering not giving Royal Assent to it. Steinhauer had been asked to refuse Royal Assent by native leaders most prominently Métis leader Stan Daniels.[613]The Métis Association of Alberta would issue a press release on May 2, 1977 in which Stan Daniels would note,

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[608] Davies, Jim. Edmonton Journal. July 12, 1976. (accessed from Alberta Legislature Library Microfiche-Lieutenant Governor 1976)

[609] Ibid.

[610] Ibid.

[611] Calgary Albertan. "Steinhauer refuses to resign. " April 18, 1977 (accessed from Alberta Legislature Library Microfiche-Lieutenant Governor 1977)

> In our opinion, this bill is directed against Native People and infringes on the Federal Governments right to legislate in the area of Native Affairs. By denying us the right to file a caveat, the Provincial Government is saying that the native people don't have an aboriginal right. These rights have been recognized in the Treaties and settlements given to both registered and Non-registered Native people over the last 100 years."[614]

Daniels viewed the legislation as unconstitutional and morally untenable. Others would view *Bill 29* as unacceptable. Edward J Labicane, a RCAF Veteran of the Second World War, would telegraph the Lieutenant Governor on May 7, 1977 at 9:56 PM noting quite ironically that "in the National Archives Washington D.C., there is a document prepared by the Reichstag and signed by Dr. Goebbels (1934) also bearing the number 29. This document was the instrument which dispossessed the Jews of any claim on their lands…many of us have given our lives in Europe to prevent such legislation."[615]The University of Alberta Student Legal Services would write angrily to Premier Peter Lougheed noting:

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[612] PAA 85. 401 Alberta Status Indian Land Claims

[613] Gilchrist, Mary. Steinhauer comments raised in house. Calgary Herald. April 22, 1977

[614] PAA 79.338 Box 9 L-9 Métis Association of Alberta Press Release May 2, 1977

[615] PAA 79.338 Box 9 L-9 Edward J Labicane Telegraph to Lieutenant Governor Ralph Steinhauer May 7, 1977 9:56 PM

> As you are aware this bill has been introduced by Attorney General Jim Foster in order to prohibit the registration of caveats on unpatented Crown lands, and to disallow aboriginal claims as the basis for a caveat within the land titles system. Two aspects of this bill concern us: first that is has been introduced in order to affect the outcome of proceeding already before the courts, and second that it has been given retroactive effect in order to remove the basis on which these proceedings were commenced...*Bill 29* provides the unpleasant spectacle of a powerful government simply legislating away a minority group's day in court. It is no defense to day that this group may proceed in other ways...[616]

The Alberta Human Rights and Civil Liberties Association would call on the Lieutenant Governor on May 5, 1977 to recommend to the Alberta Attorney General that the legislation by referred to the Alberta Supreme Court to determine whether it violated the Alberta Bill of Rights.[617] The Alberta Human Rights and Civil Liberties Association would also note, "it was suggested by several native groups that you may, in fact, feel obligated to resign rather than give Royal Assent to this Bill."[618]

Steinhauer would refuse to resign over the matter and he would later note that he would sign the legislation "If the bill is within the constitution, I have no choices, I have to sign...I checked into it."[619] It is clear that perhaps the Lieutenant Governor did not get the best possible advice on the matter. While the changes to the *Land Titles Act* did not explicitly violate any section of the B.N.A Act, 1867, the legislation did violate the spirit of the Constitution, or convention. The new legislation prevented natives from obtaining rights guaranteed under other Constitutional documents, the native treaties. The Crown had been complicit in failing to uphold their treaty obligations under Treaty 6, 7 and 8, such as providing reserve land. The Indian Association of Alberta noted this fault:

> Some bands may claim that they have never any reserve land and that their total entitlement to land is still outstanding. Other bands may claim that they have received some reserve land but not as much as they are entitled to under treaty and they have a partial entitlement to reserve land which is still outstanding. Still

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[616] PAA 79.338 Box 9 L-9 University of Alberta Student Legal Services Letter to Premier Peter Lougheed May 12, 1977

[617] PAA 79.338 Box 9 L-9 Alberta Human Rights and Civil Liberties Association Letter to Lieutenant Governor Ralph Steinhauer May 5, 1977.

[618] Ibid.

[619] "Steinhauer caught in controversy. " Calgary Herald Calgary April 18, 1977. (accessed from Alberta Legislature Library Microfiche-Lieutenant Governor 1977)

> other bands may claim that their reserves were not surveyed in the proper location.[620]

However, Steinhauer did come to the conclusion that *Bill 29* did not completely stifle the ability for native land claims, "The bill does not completely kill the rights of the Indian people to negotiate land claims," as there was "a way around" the revisions, "In any case it's a caveat worth the paper its written on? It's just a stalling procedure."[621] It is clear though, that had the proposed revisions to the *Land Titles Act* completely stifled the ability for first nations to make land claims that it would have not received the assent of Steinhauer.

Soon thereafter, allegations arose that Premier Lougheed had complained to Prime Minister Pierre Trudeau to restrain Lieutenant Governor Ralph Steinhauer. Grant Notley, the leader of the Alberta New Democrats, questioned in the Alberta Legislative Assembly whether Lougheed had intervened. "In light of statements attributed to His Honour the Lieutenant Governor concerning federal requests that he restrain public comments, particularly with respect to native questions, is the Premier in a position to assure the Legislature that at no time was there any provincial representation to federal authorities with respect to statements made by His Honour?"[622] Lougheed was unwilling to answer the question in the House responding,

> Mr. Speaker. I'm not sure that an appropriate question to ask in the Legislative Assembly. First of all, there's a presumption in the question that I think has an innuendo to it that I don't know has any basis in fact. Again, the sort of communication that might be made with regard to the office is, in my view, questionable in terms of the Legislative Assembly of Alberta.[623]

Lougheed would argue in the same exchange that such questions in the House violated the privileges of the House, specifically *Beauchesne* Section 171 ii) which does not allow for the questioning of the Crown in the House.[624] Notley denied that his question violated this section arguing, "The question was not in any way directed to His Honour…the question was really related to whether or not any official of this government, which is responsible to the Legislature, had many communication."[625]

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[620] PAA 85.401 904 Indian Land Entitlement Position Paper of the Indian Association of Alberta.

[621] Demarino, Guy. "Lieutenant-governor walking a tightrope." Edmonton Journal. April 16, 1977. (accessed from Alberta Legislature Library Microfiche-Lieutenant Governor 1977)

[622] Province of Alberta. Alberta Hansard 18th Legislature 3rd Session April 21, 1977. p. 876

[623] Ibid.

[624] Ibid.

Outside the House, Notley noted that Premier responded "in almost a panicky way" which was indicative that perhaps the Premier had contacted the Prime Minister.[626] Notley had considerable experience in dealing with Lougheed in Question Period, as the one man NDP Opposition, so his analysis is strong evidence. Paul Jackson would later paraphrase Eugene Forsey who asserted, "…that any premier would be completely within his rights to write to the prime minister or the justice minister for advice on dealing with a Lieutenant Governor and even contend the man was causing so much trouble he should be removed."[627] Steinhauer amid earlier calls for his resignation refused to do so. Steinhauer would later admit that, "he got into hot water," and was told by Ottawa not Edmonton to "cool his mouth off."[628] Steinhauer provided a threshold for his outspokenness, "In this job you can speak out providing you don't condemn too much."[629]

An important point to determine would be if Steinhauer had been justified to intervene. Had Canadian politicians adequately addressed native problems? On November 6, 1981, a letter written by Eugene Steinhauer, President of the Indian Association of Alberta and brother of the former Lieutenant Governor, to Premier Peter Lougheed noted that the provincial government negotiated a constitution on their behalf without consultation,

> Honourable Premier, at this time, we must tell you that in spite of the faith and trust, that a lot of Chiefs had with you as a Provincial Leader, we must explain now that the trust is not there any more because of your position to down-grade our Treaty and Aboriginal Rights. We will continue to forge ahead to maintain our position as Treaty Indians by establishing our contacts with the Prime Minister's office and the Imperial Crown of the British Parliament in England, in order that our Treaty and Aboriginal Rights can be constitutionally guaranteed.

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[625] Ibid.
[626] Gilchrist, Mary. Steinhauer comments raised in house. Calgary Herald. April 22, 1977 (accessed from Alberta Legislature Library Microfiche-Lieutenant Governor 1976)
[627] Jackson, Paul. "Premier could ask Ottawa to pressure Steinhauer: Senator. " Edmonton Journal. April 27, 1977 (accessed from Alberta Legislature Library Microfiche-Lieutenant Governor 1977)
[628] Demarino, Guy. Lieutenant-governor walking a tightrope. Edmonton Journal. April 16, 1977.
[629] Ibid.

> We understand also that Dick Johnston, of your office, has gone to England to talk about our Rights. In this case we must tell you that the Alberta government has no legal or Constitutional jurisdiction to speak on our behalf in England.[630]

Clearly, minority rights require protection and as a guardian of the Constitution, the Lieutenant Governor has every right to ensure this. The presence of a Lieutenant Governor with a strong consideration for native rights might have provided recourse for natives and averted the travesty of not including a vital element of Canada in the Constitutional negotiations in 1978-1982. It is doubtful that Lougheed would have been able to proceed in this manner had Steinhauer still been Lieutenant Governor.

Certainly, natives and non-natives appreciated the efforts of Steinhauer. On July 13, 1976, David C. Ward, the President of the Alberta Native Development Corporation, noted, "your quite dignified but firm stand on the situation of the Native people of your Province and your country is admired by everyone…Native and non-Native and the manner in which you presented it is one that should be learned by all politicians for all problems."[631]

C. The Contemporary Problem with Democracy in Alberta and modern Lieutenant Governors.

The lack of Parliamentary debate within Alberta is clear, as is the need for vigilant Lieutenant Governors. The legitimacy of the Conservatives to rule can also be brought into question, as they do not have the support they claim to. Mark Lisac has argued against the myth that "Alberta is a monolithic place with no differences of note."[632] Steve Patten has more concretely noted the political divisions in the province where quite surprisingly in the 2004 election "almost 80 % of Albertans either voted for an opposition party, or declined to vote at all."[633] This lack of popular support would suggest that Albertans support Lisac's claim as well as suggest the need for greater debate and inclusion for the opposition parties within the Legislative Assembly. Without this, the interests of the majority of Albertans are not being met. The Alberta Legislative Assembly meets the least of all Canada's provinces. "In 1998, the provincial legislature sat for a total of 63 days; in 1999, only 59 days; in 2000, 56 days in 2001; 36 days; and in 2002, 47 days, in 2003 and 2004, the Alberta Legislature was in session for 46 days and 36 days respectively."[634] Even the maligned federal Senate meets more than the Alberta Legislature. To compensate for the little time in the Alberta Legislature the Conservative does conducts a lot of business through orders-in-council.

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[630] PAA 85.401 903 Eugene Steinhauer Letter to Premier Peter Lougheed November 18, 1981

[631] PAA 79.338 A-1 David C. Ward Letter to Lieutenant Governor Ralph Steinhauer July 13, 1976

[632] Lisac, Marc. Alberta Politics Uncovered: Taking back our Province. NeWest Press: Edmonton, 2004. p. 58

[633] Soron, Dennis. "The Politics of De-Politicalization: Neo Liberalism and Popular Consent in Alberta' From Harrison, Trevor W. The Return of the Trojan Horse: Alberta and the New World (Dis) Order. Montreal: Black Rose Books, 2005 p. p. 66

Keith Brownsey has juxtaposed the number of bills passed by Legislature with the number of orders-in-council signed by the Lieutenant Governor. In 2004, there were 591 orders-in-council, but only 35 bills passed.[635] While the passing of bills receives some debate, the issuing of orders-in-council receives none. Some of the orders-in-council issued by the Klein government were substantial in scope and they included, "regulations for the generation, sale and transmission of electricity, the creation of regional health districts, and back-to-work legislation for teachers."[636] Many of these measures, along with other Orders-in Councils, should have been submitted as bills and undergone more legislative review. Moreover, the circumventing of the Legislature is part of the problem with the Parliamentary process in Alberta. The Alberta Legislature arguably performs little if any of the traditional roles outlined,

> Ideally, the Legislature acts as a watchdog over the government, offers an alternative government in the opposition, establishes a legitimate government through the electoral process, and provides the authority, funds and other resources necessary for governing…provides a place for reasoned debate, where the will of the voters will be expressed.[637]

The fact that Alberta has never had a minority government, but instead large majorities, has contributed to the spending of millions of dollars by orders-in-council that do not require legislative approval or any debate by the opposition. The approval of such measures is at the discretion of the Lieutenant Governors and some past and modern Lieutenant Governors have felt the need to tell the elected executives that this process subverts and circumvents the democratic process. Two of the Lieutenant Governors that served in the 1990's raised concerns on the way the Conservative government uses orders-in-council.

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[634] Brownsey, Keith. "Ralph Klein and the Hollowing of Alberta." From Harrison, Trevor W. The Return of the Trojan Horse: Alberta and the New World (Dis) Order. Montreal: Black Rose Books, 2005 p. 33
[635] Ibid.
[636] Ibid.
[637] Ibid.

Refusing orders-in-council

In February 1993, Alberta Lieutenant Governor Gordon Towers refused the advice of one of his Alberta ministers when he declined to sign an order-in-council that he felt inappropriate. The order-in-council was a 1.5 million grant that proposed by then Economic Development Minister Ken Kowalski, a minister who had earned a reputation in pork barrel politics. Gordon Towers noted, "If I hadn't had the situation corrected within the department, within the ministers, within the Cabinet, then I would have gone to the Premier…I didn't feel that the money should go to that individual a man from "one of the northern ridings."[638] Towers would note that the Office of Lieutenant Governor "is not just a rubber stamp."[639]

At least one Alberta cabinet minister expressed surprise at Lieutenant Governor Tower's intervention. Ernie Isley, who had brought forth the order-in-council on Kowalski's behalf, noted, "I was not surprised he had the power…but I was surprised he used the authority . . . I can remember him holding it up and a subsequent discussion on it . . . He was justified in feeling comfortable before he signed it."[640] The Liberal Treasury Critic Mike Percy would note that Tower's actions "shows the integrity of the lieutenant-governor. It was the right thing to do."[641]

Despite the fact that Lieutenant Governor Gordon Towers and his successor Bud Olsen were from different political parties and would later demonstrate an extreme dislike for one another, they both shared the same concerns of the use of special warrants and Orders-in-council. Lieutenant Governor Bud Olson as Ashley Geddes would note to was,

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[638] Crockatt, Joan. "Lt.-Gov. wouldn't OK grant from Kowalski"; [FINAL Edition] Edmonton Journal. Edmonton, Alta.: Dec 23, 1994. p. A.1.
[639] The Gazette. "Alberta lieutenant-governor blocked iffy grant; [FINAL Edition]" Montreal, Que.: Dec 24, 1994. p E.3
[640] Ibid.
[641] Ibid.

> ‘really concerned’ that the government had resorted to paying its bills in the past without legislature scrutiny ‘because that to me is wrong.’ He made it clear that, unless it was an emergency situation, he would view dimly any special warrants that cross his desk and hinted strongly he could refuse to sign,’ It would be very, very tempting to say, ‘Try this in the legislature first and see what they think of it...That's what I would be tempted to say and I think I'm in my Constitutional duty doing it that way.’[642]

This vigilance demonstrated by Towers and Olson had origins in their predecessors most notably demonstrated by William Walsh, John Campbell Bowen and Ralph Steinhauer.

Lieutenant Governors: The rest of Canada.

D. Frank Bastedo

The reservation of legislation by Lieutenant Governor Frank L Bastedo in Saskatchewan in 1961 came as a complete surprise to many, even to the federal government. Rand Dyck notes, “In 1961, the Lieutenant Governor reserved a bill for the consideration of the federal Cabinet, 24 years after the power had last been exercised in any province and long after it was considered obsolete.”[643] The legislation in question was *Bill 56*, the *Mineral Contracts Alteration Act* which Bastedo felt, as described by John Diefenbaker, was “(1) *ultra vires* of the provincial legislation and (2) contrary to the national interest.”[644]Bastedo would describe in a statement to the press,

> ...this is a very important bill affecting hundreds of mine contracts. It raises implications which throw grave doubts of the legislation being in the public interest. There is grave doubt as to its validity.[645]

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[642] Geddes, Ashley. “I expect to be in trouble all the rest of my life'; Bud Olson, lieutenant-governor of Alberta, former Liberal Cabinet minister, unrepentant pragmatist, has always said what he thinks. If that gets him in trouble . . “[FINAL Edition]” Edmonton Journal Edmonton. Dec 15, 1996. p. F.3

[643] Dyck, Rand. Provincial Politics in Canada: Towards The Turn of the Century. Prentice Hall Canada: Scarborough, 1996. p. 453

[644] Diefenbaker, John. One Canada Memoirs of the Right Honourable John G. Diefenbaker: The Years of Achievement 1957-1962. Macmillan of Canada: Toronto, 1976. p. 56

[645] Mallory, J.R. The Lieutenant-Governor's Discretionary Powers: The Reservation of Bill 56. The Canadian Journal of Economics and Political Science. Vol. 27, No. 4 (November 1961) p. 518

This move by Bastedo came to the utter surprise of Prime Minister John Diefenbaker who noted in the House on April 10, 1961,

> …the first information the government received on this matter was on Saturday, when the lieutenant governor telephoned the under secretary of state that he had reserved a bill of the Saskatchewan legislature for the signification of the Governor General's pleasure…We have no other information on the matter. There was no consultation in advance in any way, and any action in this regard would be taken by the lieutenant governor himself.[646]

Diefenbaker would soon it make it clear that the federal cabinet would advise the Governor General to grant Royal Assent to *Bill 56*. On May 5 Diefenbaker would table in the House of Commons the order-in-council signed by the Governor General conferring Royal Assent to *Bill 56*.

A common point of interest cited both by Diefenbaker in his memoirs and Mallory in The Structure of Canadian Government is John A. Macdonald's 1882 Minute-of-Council, which was sent to each Lieutenant Governor at the time:

> The Lieutenant Governor is not warranted in reserving any measure for the assent of the Governor General on the advice of his Ministers. He should do so in his capacity of a Dominion Officer only, and on instructions from the Governor General. It is only a case of extreme necessity that a Lieutenant Governor should without such instructions exercise his discretion as a Dominion Officer in reserving a bill. In fact, with facility of communication between the Dominion and provincial governments such a necessity can seldom if ever arise.[647]

J.R Mallory would note, "It is doubtful if Macdonald's minute of council of 1882 has been known to Lieutenant Governors in this century."[648] Both Mallory and Diefenbaker imply that with respect to the power of reservation that the Lieutenant Governor was still in effect a dominion officer subject to act on advice by the federal Cabinet. As Diefenbaker would argue, "No provincial act should ever be reserved except on the request of the federal Cabinet."[649]

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[646] Canada, House of Commons, *Debates* (April 10, 1961) p. 3484

[647] Diefenbaker, John. One Canada Memoirs of the Right Honourable John G. Diefenbaker: The Years of Achievement 1957-1962. Macmillan of Canada: Toronto, 1976. p. 57

[648] Mallory, J.R. The Structure of Canadian Government, rev ed. Toronto: Gage Publications, 1984 p. 369

[649] Diefenbaker, John. One Canada Memoirs of the Right Honourable John G. Diefenbaker: The Years of Achievement 1957-1962. Macmillan of Canada: Toronto, 1976. p. 57

This concept became obsolete with the decision of several court rulings including the JCPC ruling in *Liquidators of Maritime Bank v. Receiver General*, where it was determined that the Lieutenant Governor was not a dominion officer. Ronald I Cheffins has argued that, "No one today would argue that the Lieutenant Governor is in any way a federal officer whose role is to protect federal interests."[650] As such, the 1882 requirement that Lieutenant Governors follow the orders of the federal cabinet on reservation presumed a false constitution order was not in effect after the landmark JCPC decision of *Maritime Bank*. Instead, the only binding orders that the Lieutenant Governors would be required to follow on the matter of reservation would come from the Governor General. As noted by Justice Kerwin of the Supreme Court of Canada in the *Reference Re Disallowance and Reservation* in 1938, "the power of reservation is to be exercised by the Lieutenant Governor 'according to his Discretion, but subject to the Provisions of this Act and to the Governor General's Instructions."[651]

Mallory has also noted that the Bastedo reservation sparked some desire for reform, "Although Mr. Diefenbaker told the House after the event that consideration was being given to providing more explicit instructions to Lieutenant Governors, nothing in fact was done."[652]Therefore, the Lieutenant Governor, independent of any instructions of the federal government or the Governor General, can exercise the power of reservation. Bastedo would also seriously consider not giving Royal Assent to the Medicare legislation proposed by the Douglas legislation the next year. After consulting with the federal government, the Lieutenant Governor did give Royal Assent. The Bastedo case would demonstrate that Lieutenant Governors continue to exercise their power in the modern era.

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[650] Cheffins, Ronald I. "The Royal Prerogative and the Office of Lieutenant Governor." Canadian Parliamentary Review. Vol. 23, no. 1 2000 p. 1

[651] *Reference re Disallowance and Reservation*, [1938] SCR 71 at 95

[652] Mallory, J.R. The Structure of Canadian Government, rev ed. Toronto: Gage Publications, 1984 p. 370

E. John B. Aird (Byng-King all over again)

The discretion of a Lieutenant Governor or Governor General with the election of a minority government become heightened, especially when that government demonstrates at the first possible convenience that it cannot command the confidence of the House. In 1985, this prospect confronted John B. Aird, Ontario's Lieutenant Governor, soon after the general election. The results of the May 1985 had been such that the Conservatives had 52 of the 125 seats of the Legislative Assembly of Ontario, while the Liberals and the NDP had 48 and 25 respectively.[653] To complicate matters the leaders of the opposition Bob Rae and David Peterson, of the NDP and the Liberals respectively, had come to an agreement whereby the NDP had promised that they would support a Liberal government. As a result the Conservative Premier Frank Miller as Andrew Heard notes, "immediately sought legal advice about whether this agreement could be challenged in the courts-even though it clearly related to matters governed by convention."[654]

Quite correctly, Lieutenant Governor John B. Aird held the view the NDP and Liberal alliance was moot until they could demonstrate that they could command the confidence of the House. In the meantime, the Conservatives continued to serve as the government. It soon became apparent that the Conservative government would be defeated on their first confidence vote approving the Speech from the Throne. As Edward McWhinney has noted, "Would Premier Miller have the right to obtain dissolution and fresh general elections from the Lieutenant Governor? The premier indicated publicly that he would take this position."[655]

However, On May 11, 1985, Eugene Forsey disputed this position in a letter to the Globe and Mail,

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[653] White, Randall. Ontario Since 1985. Eastendbooks: Toronto, 1998. p. 56

[654] Heard, Andrew. Canadian Constitutional Conventions: The Marriage of Law and Politics. Oxford University Press: Toronto, 1991 p. 40

[655] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005. p. 108

> If Mr Miller is defeated on the address in reply from the Speech from the Throne, he can advice the Lieutenant Governor to dissolve the newly elected legislature. But the Lieutenant Governor could not, in conscience accept such advice. Mr Miller would have no right whatever to drag us through the polling booths by the scruff of the neck when there is, plainly, the possibility that the Liberal leader David Peterson could form a government and carry on the public business with the support of the NDP. Of course, if the NDP refused to support either Mr Miller or Mr Peterson, then a fresh election is the only way out.[656]

D.A Low has drawn parallels to this situation and the Byng-King episode,

> The unpredictable Frank Miller, the Conservative Premier, might choose to hang on to office, meet the legislature, suffer immediate defeat and then seek a dissolution. This was 1926 all over again. The only difference from 1926 was that this time the Opposition professed to be a government-in-waiting…if Aird refused Miller his dissolution he would be doing to a Conservative Premier what Byng had done to Mackenzie King.[657]

On May 28, 1985, David Peterson and Bob Rae demonstrated more than a verbal alliance when they presented a joint letter to the Lieutenant Governor in which the NDP pledged to support David Peterson would refrain from motions of non-confidence for a two-year period.[658] The predictions were correct as the Conservatives soon lost the confidence vote on the Speech from the Throne. Randall White described the events that followed, "When the earliest opportunity arose on the evening of June 18 Frank Miller's government was duly defeated. Following the rules of Ontario's Parliamentary democracy (and the terms of the Liberal-NDP accord), on the afternoon of June 19 Lieutenant Governor John Aird asked David Peterson to form a government as the province's twentieth premier."[659]However, unlike Mackenzie King some 59 years earlier, Frank Miller quietly chose to admit defeat without causing a Constitutional Crisis. Miller abandoned his earlier belligerence over the constitutionality of the agreement between the NDP and the Liberals. The NDP-Liberal partnership would last longer than the promised two years, resulting in a three-year partnership until Peterson tried for a majority, but was defeated by Bob Rae.

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[656] Hodgetts, J. F. The Sound of One Voice: Forsey, Eugene and his Letters to the Press. University of Toronto Press: Toronto, 2000. p. 131

[657] Low, D.A. Constitutional Heads and Political Crises Commonwealth Episodes, 1945-85. St. Martin's Press: New York, 1988. p. 231

[658] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005. p. 108

[659] White, Randall. Ontario Since 1985. Eastendbooks: Toronto, 1998. p. 56

As Edward McWhinney has argued, "the lesson: claimed conventions (here that the head-of-state must always yield to the advice of the head of government) are based on special facts of their time and place in Constitutional history, and should be studied in that context."[660]The thought and care that went into Lieutenant Governor Aird's decision should not come as a great surprise. His attitude on the signing of orders-in-council and the granting of Royal Assent demonstrates that John Aird was a Lieutenant Governor who was conscious of his role,

> Having practised law for thirty years, I understand what it means to sign your name to any document. Contractual obligations are very important. I have trained to look at and try to understand every document. I will not sign anything mindlessly. I request that paper be in my hands with adequate time to ponder properly and consider their content and impact. If I agree, I sign. If not, I send them back for clarification or further consideration. I work until I'm through with what is presented to me each day and never keep documents overnight.[661]

This is precisely the attitude with which Canada's vice-regals should administer their roles. It is their duty as the representative of the Sovereign to be an effective check and balance on the elected executives. Aird's sentiment is not unique among Lieutenant Governors, but it may be in the minority.

F. David Lam

Robert Cheffins has written that, "The power of dismissal of a first minister is one that still remains an important weapon in the arsenal of the provincial Lieutenant Governor."[662] While many critics have dismissed the notion that a Lieutenant Governor would ever play a role in contemporary Canada, the Lam case study serves as a contradiction of this theory.

In 1991, His Honour David Lam, Lieutenant Governor of British Columbia while giving a speech at the University of Victoria noted that Confucius's most important maxim for a government was trust: "without the trust and confidence of the people no government can stand… it must fall."[663] The significance of this speech was clear, especially given that June Lam had admitted he would have made a "historic decision" and dismissed Premier Bill Vander Zalm had he continued serving as Premier. The conflict of interest commissioner had investigated Vander Zalm over allegations that he had used his public office for personal gain in the sale of Fantasy Gardens to a Taiwanese billionaire. Lam's predecessor Bob Rogers had also prepared himself to use his vice-regal powers to dismiss Vander Zalm over an earlier investigation by the RCMP,

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[660] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005. p. 110

[661] Aird, John Black. The Honourable. Loyalty in a Changing World: The Contemporary function of the Office of the Lieutenant Governor of Ontario. Queen's Printer of Ontario, 1985. p. 13

[662] Cheffins, Ronald I. "The Royal Prerogative and the Office of Lieutenant Governor. " Canadian Parliamentary Review vol. 23, no.1 2000

> …. this was not the first time a Lieutenant Governor was forced to reflect on Mr. Vander Zalm's future. In 1988, Mr. Vander Zalm was under police investigation for influence-peddling and the then Lieutenant Governor, Bob Rogers, was also alerted to the possibility he might have to exercise the powers of his office. Though no charges resulted from the investigation, the situation was considered so serious that Mr. Rogers' five-year term of office was extended several months, delaying the appointment of Mr. Lam as his successor.[664]

Daniel Gawthrop has noted the actions of Lieutenant Governor David Lam at the swearing-in ceremony of the new Premier, Mike Harcourt:

> The swearing-in ceremony, which took place before a crowd of 1,200 invited guests the University of Victoria, was notable for the speech by Lieutenant Governor David Lam. Lam, a Chinese Immigrant who had made is fortune in real estate, had become one of the most popular Queen's representatives in BC, and ended up serving more than six years in Government House. On this day, he received a standing ovation when he called for "the healing of wounds" after six years of confrontation and corrupt government.[665]

Even after the change of government Lam was quite vocal about the role of the Lieutenant Governor, "He appealed to the Harcourt government to come to him to consult, for encouragement and to be 'warned on appropriate occasions."[32]

In the context of British Columbia it is important to note that the powers of the Lieutenant Governor are regulated not only by the federal Constitution but a provincial

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[663] Kieran, Brian. "Lieutenant-governor's speech soul-stirring; [1* Edition]." The Province. Vancouver, B.C.: Nov 7, 1991. p. A.6

[664] Palmer, Vaughn. "Mr. Lam was prepared to do his duty; [4* Edition].". The Vancouver Sun. Vancouver, B.C.: Jul 31, 1991. p. A.10

[665] Gawthrop, Daniel. Highwire Act: Power, Pragmatism, and the Harcourt Legacy. New Star Books: Vancouver, 1996. p. 54

Constitution as well, S. 23 (1) of which notes, "The Lieutenant Governor may, by proclamation in Her Majesty's name, prorogue or dissolve the Legislative Assembly when the Lieutenant Governor sees fit."[33]

G. Lieutenant Governors in Quebec: Thibault

Rand Dyck has pointed out that, "Recent Quebec governments have not much use for the Queen's representative, the Lieutenant Governor, and the PQ does its best to ignore him completely."[666] This is not surprising since the Lieutenant Governor serves as the unifying anti-thesis of many a sovereigntist government that has occupied Quebec's Hotel du Government and the National Assembly.

The appointment of Lise Thibault illustrated a breach with this traditional sentiment. Within days of the announcement of her appointment as Lieutenant Governor, the sovereigntist government of Lucien Bouchard welcomed her comments "as a breath of fresh air."[667] The comments in question were those she made in a television interview, before being sworn-in as the new Lieutenant Governor of Quebec. Thibault had noted that in the event of a sovereigntist victory in a referendum that she would grant Royal Assent to a bill declaring Quebec's independence. As Thibault would note, "I would grant my sanction because in a democracy you cannot not respect the people's choice."[668] However, as Michel Auger has noted, "Her predecessor, Jean-Louis Roux who resigned last fall always refused to answer that question, but hinted that he could not sign such a law."[669] Some would contend that although the Lieutenant Governor is not a dominion or federal officer, the post nonetheless requires some consideration of the national not merely the provincial interest. Andrew Coyne would agree, declaring Thibault's admission was tantamount to giving legitimacy to a coup as well as a violation of her oath to "bear true allegiance to the Queen …in accordance with the law."[670]This was somewhat remarkable for Canada. A vice-regal was admonished for precluding the refusal of assent to legislation. Clearly, there is an expectation that the Lieutenant Governors in Quebec would refuse Royal Assent to any secessionist legislation. Due to the backlash, Thibault did take efforts to clarify some of her comments by saying she would withhold assent if there was "a very clear directive from the Canadian government," if the referendum question was unclear and of course there was the matter of the Governor General who might intervene.[671] Bouchard would recant his earlier praise and deemed her an "archaic relic of a colonial regime."[672]

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[666] Dyck, Rand. Provincial Politics in Canada: Towards The Turn of the Century. Prentice Hall Canada: Scarborough, 1996. p. 100

[667] Coyne, Andrew. "Thibault should be sacked is she doesn't take it back. " Edmonton Journal. January 25, 1997 (accessed from Alberta Legislature Library Microfiche-Lieutenant Governor 1997)

[668] Ibid.

[669] Auger, Michel. "Gift to separatists from lieutenant-governor." Edmonton Journal. January 26, 1997 p. A.8

Another controversial comment by Thibault was her candid admission that she had consulted the spirits of her dead friends and relatives. After receiving the call from Jean Chrétien to become Quebec's next Lieutenant Governor she quickly convened a summit meeting who had advised her to take the job after just fifteen minutes. Included in the spirit summit were her dead grandparents, parents, aunts, uncles and friends. Thibault would describe the intricacies of convening summit meetings,

> It's so simple. You give a call to a friend and you say to friend in who you have confidence, what do you think about that. And he gives you his opinion. And you take what you want and you feel at ease because it will help you. But you don't give a call to people with whom you don't have a relation, you don't have respect, you don't have confidence. That's all.[673]

As Andrew Coyne has noted, "God only knows what qualification Lise Thibault brought to her appointment as Lieutenant Governor of Quebec, but apparently a passing acquaintance with Constitutional law was not one of them."[674] A Lieutenant Governor or Governor General should be more concerned with the spirit of the Constitution rather than any spirits from the great beyond. Nor should they conduct affairs of state via the Ouija board.

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[670] Coyne, Andrew. "Thibault should be sacked is she doesn't take it back. " Edmonton Journal. January 25, 1997 p. A.9
[671] Ibid.
[672] Ibid.
[673] Thompson, Elizabeth. "Spirits `summit' convinced her to take job; [FINAL Edition]" Southam Newspapers. Calgary Herald. Calgary, Alta.: Feb 01, 1997. p. A.13
[674] Coyne, Andrew. "Thibault should be sacked is she doesn't take it back. " Edmonton Journal. January 25, 1997 p. A. 9

The appointment of Thibault demonstrated the problematic aspects of partisanship. As Michel Auger said of Thibault: "She had a rather brief political career–she ran unsuccessfully for Claude Ryan's Liberals in 1981-and later became the head of the provincial government's Office des personnes handicappées, only to be fired by the new PQ government so it could find a place for a political appointment of its own."[675]

H. Preliminary Conclusions

Chapter VII demonstrates that Lieutenant Governors have continued relevance in contemporary politics. The study of Alberta is important in this respect, as it has never had a minority government. By all theoretical accounts, it should seem that vice-regal action or intervention should rarely occur in such a situation, and yet there has been consistent vice-regal intervention in Alberta. In fact, an examination of Lieutenant Governors in Alberta has demonstrated that Lieutenant Governors have consistently had relevance throughout the province's history. During the Social Credit era under William Aberhart, several Lieutenant Governors threatened intervention or did intervene. This was especially important given that Premier Aberhart chose to ignore large parts of the Constitution and propose legislation that reflected this. The Lieutenant Governor in this instance protected the constitution and the rights of the citizens of Alberta. In the modern era, Ralph Steinhauer would defend the rights of Natives, even if this meant clashing with Alberta's Premier Peter Lougheed. In the 1990's several Alberta Lieutenant Governors would voice concerns over the use of orders-in-council. In fact, in 1993 Lieutenant Governor Gordon Towers would even refuse to grant assent to an order-in-council.

Besides Alberta, there is evidence of vice-regal intervention throughout the rest of Canada. In 1985, Ontario's Lieutenant Governor John B. Aird was presented with almost the same scenario that Lord Byng was in 1926. The Lieutenant Governor would appoint a Premier that had not won a general election. This did not result in a Constitutional conflict. In 1991, the Lieutenant Governor of British Columbia was willing to dismiss the Premier after he was involved in some criminal activities. The case study of Lise Thibault in Quebec demonstrates that there is an expectation that a Lieutenant Governor in that province would intervene to prevent Quebec's independence.

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[675] Michel Auger. "Gift to separatists from lieutenant-governor. " Edmonton Journal. January 26, 1997 p. A. 8

Chapter VIII. Governors General and Lieutenants Governor in the Commonwealth: some Precedents of Intervention.

The examination of precedents from the Commonwealth is helpful in providing an understanding of Canada's vice-regals. For instance, while there are relatively few instances or precedents of Canadian vice-regals using their reserve prerogative powers in modern times, there are precedents in the Commonwealth. Those precedents, it should be pointed out, can be invoked when Constitutional or some other political arbitration is needed in Canada. While this will described in greater depth shortly, it might be helpful to identify some quick precedents that challenge the established myths on the role of the Crown.

One precedent that establishes the Crown operating outside the scope as provided by the myths of politically impotent vice-regals has been the Queen. The Sovereign of Canada has been seen as a strictly non-partisan figure devoid of any opinions. However, there is some evidence that demonstrates that the last three sovereigns have demonstrated some political opinions. Even Queen Elizabeth II has demonstrated political views. As Rodney Brazier has noted,

> In 1986 someone in Buckingham Palace (generally assumed to be the Queen's Press Secretary Sir Michael Shea) allowed the *Sunday Times* to publish a story that the Queen was 'dismayed' by 'an uncaring Mrs Thatcher': the source had agreed with the suggestions from that newspaper that the Queen disapproved of several major government policies.[676]

Another brief example of the Crown operating outside perception comes with Pakistan. With the independence from Britain in 1947, Pakistan continued with some colonial institutions including the Office of the Governor General. The Governor General in Pakistan would certainly use considerable discretion in the early history of an independent Pakistan. As D.A Low describes, "First in 1953 the Governor General dismissed a Prime Minister; the next year he dissolved the Constituent Assembly which had also served as its legislature."[677] J.R Mallory has noted that the intervention in Pakistan became more relevant to Canada with the actions in Australia in 1975,

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[676] Brazier, Rodney. Constitutional Practice. Clarendon Press: Oxford, 1998. p. 149

> Dismissal is clearly the ultimate weapon, to be employed only if the alternatives are certain to be worse. While the Governor General of Pakistan could dismiss a ministry on April 17, 1953, it would see almost inconceivable that this could happen in such countries as Canada or the United Kingdom. Nevertheless, on November 11, 1975, the Governor General of Australia did dismiss the Whitlam government.[678]

These examples demonstrate how conventions and activities throughout the Commonwealth can have implications for Canada.

Australia

A. Kerr-Whitlam

Another Commonwealth example is the reserve prerogative power of dismissal. J.R Mallory has asked whether the lack of use of the reserve vice-regal powers in Canada is indicative that they are inoperative. He answers the question by citing a precedent from the Commonwealth.

> As recently as 1975, the Governor General of Australia, which has a constitution very similar in wording to that of Canada, dismissed his prime minister, and installed the Leader of the Opposition in his place. The actions of Sir John Kerr in Australia may have been both surprising and politically unwise, but it was legal. It would not be unreasonable to conclude that in a sufficiently grave Constitutional Crisis, dismissal could happen in Canada.[679]

The events surrounding the dismissal of the Australian Prime Minister need elaboration to provide a better frame of reference.

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[677] Low, D.A. Constitutional Heads and Political Crises Commonwealth Episodes, 1945-85. St. Martin's Press: New York, 1988. p. 7

[678] J.R. Mallory. The Structure of Canadian Government, rev ed. Toronto: Gage Publications, 1984 p. 58

[679] Mallory, J.R. "The Continuing Evolution of Canadian Constitutionalism" from Cairns, Alan & Williams, Cynthia. Constitutionalism, Citizenship and Society in Canada. Royal Commission on the Economic Union and Development Prospects for Canada. Vol. 33. University of Toronto Press: Toronto, 1985. p. 51

Paul Kelly has written that, "There are few men who have either the power or the opportunity to change the course of history. Australia' eighteenth Governor General, John Robert Kerr, had both in November 1975 and did not hesitate to use them."[680] Sir John Robert Kerr would indeed change history, provoke a re-examination of the role of the Governor General in Australia, and spark calls for the abolition of the monarchy in Australia and the adoption of a republic. The intervention by the Governor General would also demonstrate that the prerogative powers of the Crown were still in effect in modern times.

The crisis in Australia arose after Malcolm Frasier, the Conservative Leader of the Opposition, decided to challenge the Labour Government of Gough Whitlam not in the House of Representatives, but in the Senate. This challenge came after the death of Senator Milliner, the Labour representative for Queensland. A potential for deadlock emerged in the upper house after the Senator who replaced Milliner, Senator Field, declared that he would not support Whitlam in the Senate. This deadlock came to a head on October 15, when the Opposition Leader, Malcolm Frasier, announced that the Senate would defer on the votes of supply until the Labour government called a general election or resigned. However, the House of Representatives had already approved the vote of supply where Gough Whitlam possessed a minority. The Australian Senate would justify its action by declaring that, "The Prime Minister's failure to maintain proper control over the activities of his ministers…and….the continuing mismanagement of the Australian economy …which have…created inflation and unemployment not experienced for 40 years: The Appropriation Bills should not be 'proceeded with until the Government agrees to submit itself the judgement of the people.'"[681]

Under Australian practice, it was against Constitutional convention for the Senate to deny supply once approved by the Lower House. The Australian Senate had not ability to amend or initiate any supply legislation. Before Whitlam's tenure, the Senate had never refused or even significantly delayed Supply. Indeed, the House of

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[680] Kelly, Paul. The Unmaking of Gough. Angus & Robertson Publishers: Sydney, 1976. p. 4
[681] Low, D.A. Constitutional Heads and Political Crises Commonwealth Episodes, 1945-85. St. Martin's Press: New York, 1988. p. 95

Representatives responded angrily to the Senates intrusion into a Constitutional matter firmly under their control. The Senate noted, "…that the Constitution and the conventions of the Constitution vest in this House the control of the supply of moneys to the elected Government and that the threatened action of the Senate constitutes a gross violation of the roles of the respective Houses of Parliament in relation to the appropriation of moneys."[682] Governor General Sir John Kerr indicated that he supported this convention in 1974 in a discussion between himself and Prime Minister Whitlam, even indicating that if measures of supply had the confidence of the House of Commons this would be enough to warrant assent, even without the review of the Senate. "Wouldn't the power to reject be the ultimate form of amendment and therefore beyond the constitution?"[683] He would not provide any evidence to the Prime Minister that he had radically changed his views on this matter during the Constitutional Crisis, which arguably changed Whitlam's strategy in dealing with this crisis. In fact, in late September 1975 Kerr had told the Minister of Labour and Immigration, James McClelland that: "I do not acknowledge that I have any role until the money runs out."[684] On October 16th Bob Ellicott, one of Malcolm Fraser's shadow ministers, would present in a press release his Constitutional opinion that the government's inability to obtain supply would make it "open to the Governor General to dismiss his present Minister's and seek others who are prepared to give him the only proper advice open."[685] Sir John Kerr would call Whitlam on the same day all the while noting that Ellicott's opinion was "bullshit."[686]

As a way of getting around the Senate deadlock, Whitlam proposed a plan recounted by Edward McWhinney. "The pragmatic solution Whitlam offered the Governor General to resolve the impasse with the Senate was a dissolution limited to one-half only of the Senate (permitted under the Australian Constitution) as a means of breaking the voting deadlock between the two houses."[687] James Walter notes, "Whitlam put pressure on the Senate, and the opposition parties, by mooting contingency plans to support his continued administration even if Supply should run out."[688] Richard Hall described the Whitlam financial plan: "If Supply ran out, the Government would issue vouchers that could be cashed with the co-operation of credit provided by the banks."[689]

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[682] Ibid.
[683] Kelly, Paul. The Unmaking of Gough. Angus & Robertson Publishers: Sydney, 1976. p. 6
[684] Hall, Richard. The Real Kerr, John: his brilliant career. Angus & Robertson Publishers: Sydney, 1978. p. 134
[685] Low, D.A. Constitutional Heads and Political Crises Commonwealth Episodes, 1945-85. St. Martin's Press: New York, 1988. p. 96
[686] Hall, Richard. The Real Kerr, John: his brilliant career. Angus & Robertson Publishers: Sydney, 1978. p. 134

By November 6th Sir John Kerr had made his decision, he would dismiss Prime Minister Gough Whitlam. He had his last mediation session with the Prime Minister on that date. Afterward, he now began to meet secretly with Malcolm Fraser, the Leader of the Opposition. Sir John Kerr promised to commission Fraser as the Prime Minister on the condition that once in power he would advice him to implement a double dissolution. This is exactly what occurred after Fraser became Prime Minister.

Kerr had also consulted with the Chief Justice of Australia, Sir Garfield Barwick on a course of action. Henderson has perhaps suggested some incongruities in this consultation, as the matter could have come before the High Court of Australia. Perhaps it would have been more appropriate if the full bench of the High Court had consulted. The Chief Justice of the time, Sir Garfield Barwick, would defend Kerr's consultation arguing that it was entirely appropriate for the Governor General to seek the advice of the Chief Justice. In fact, matters such as the revoking of the Prime Minister's commission were beyond the scope of inquiry of the High Court in any event. Probably the more disconcerting part of Whitlam's consultation with Barwick was his background. As described by Edward McWhinney, Barwick had, "been a prominent conservative MP and federal attorney-general before his appointment as chief justice."[690] Clearly, the Chief Justice could not claim to be non-partisan and it is troubling that his advice would lead to the installation of a conservative Prime Minister.

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[687] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005. p. 66

[688] Walter, James. The Leader: A Political Biography of Gough Whitlam. University of Queensland Press: St. Lucia, 1980. p. 262

[689] Hall, Richard. The Real Kerr, John: his brilliant career. Angus & Robertson Publishers: Sydney, 1978. p. 141

[690] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005. p. 66

On November 10, 1975, Barwick would send Kerr a letter noting,"…a government having the confidence of the House of Representatives but not that of the senate, both elected houses, cannot secure supply to the Crown."[691] Barwick would also pave the way for the Governor General to dismiss the Whitlam,

> In the event that, conformably to this advice, the prime minister ceases to retain his commission, Your Excellency's Constitutional authority and duty would be to invite the Leader of the Opposition, if he can undertake to secure supply, to form a caretaker government (i.e. one which makes no appointments or initiates any policies) pending a general election, whether of the house of representatives, or of both houses of Parliament, as that government may advise.[692]

There was also an implicit Canadian connection to Kerr's intervention. In his memoirs, Kerr devoted an entire chapter to the Canadian Constitutional scholar Eugene Forsey[693] who heavily influenced his views on the Governor General. "It was during 1975 that I read the great work The Royal Power of Dissolution of Parliament in the British Commonwealth by the eminent Canadian Constitutional authority Senator Eugene Forsey."[694] Therein, Forsey would deconstruct the myth that the Governor General was a rubber stamp. This particular argument would resonate with Kerr, who would cite the following statement made by Forsey:

> Many people will object… that the Crown is just a rubber stamp for the Cabinet, or that if isn't it ought to be. The first objection is nonsense. The Crown undoubtedly has some power to refuse a Cabinet's advice.[695]

With such a set of beliefs on the role of the Governor General, Sir John Kerr would set forth to dismiss Prime Minister Gough Whitlam.

The dismissal of Whitlam came on November 11, 1975. As noted by both Paul Kelly and Richard Hall, Kerr's pattern of deception persisted to the last minute. Prime Minister Gough Whitlam had called in the morning to arrange an appointment at

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[691] Kelly, Paul. The Unmaking of Gough. Angus & Robertson Publishers: Sydney, 1976. p. 357
[692] Ibid. p. 358
[693] The Chapter is entitled: Forsey-the Power of Dismissal and Forced Dissolution; the Rubber Stamp theory.
[694] Kerr, John. Matters for Judgment: An autobiography. The MacMillan Company of Australia: Melbourne, 1978. p. 209
[695] Ibid. p. 217-18

Government House to advise the calling of elections for one-half of the Senate to take place on December 13. Once Whitlam arrived around one, Kerr asked if he would consider a double dissolution of both the House of Representatives and the Senate instead. Whitlam indicated that he would not be amenable to this request. Kerr proceeded to note, "In that case I am withdrawing your commission."[696]Whitlam replied that he would contact the Queen, indicating that he would seek the removal of the Governor General. Kerr told him it was too late and handed him the already prepared revocation of his commission as Prime Minister.[697] Malcolm Fraser was at that moment meters away from Whitlam in another room at Government House, waiting to be sworn-in, as Australia's new Prime Minister.[698]

Sir John Kerr later announced in a public statement, "Because of the principle of responsible government a Prime Minister who cannot obtain Supply including money for carrying on the ordinary services of government must either advise a general election or resign. If he refuses to do this I have the authority and duty indeed under the Constitution to withdraw his commission as Prime Minister."[699]However, Whitlam had no trouble in securing the approval of supply from the House of Representatives. A double dissolution seemed to be the wrong decision, especially given that an election had just occurred in 1974. Whitlam's recommendation of the one-half dissolution of the Senate seemed more reasonable. Kerr would also indicate concerns over the financial contingency plans, "the announced proposals about financing public servants, suppliers, contractors and other, do not amount to a satisfactory alternative to Supply."[700]

The resulting election on December 13, 1975, ended with a Whitlam defeat. However, this defeat of Whitlam did not indicate the tacit approval of the Australian citizens for the Governor General actions. As James Walter notes, other political machinations played a role, "Despite public consternation over the Governor General's actions, the ALP failures of performance in the past year weighed heavily against sympathy for Whitlam."[701] Richard Hall notes that, "Whitlam fought the 1975 campaign with one hand tied behind his back. He refused to disclose his private conservations with Kerr in the period up to 11 November, and still refuses to break their confidentiality."[702] Whitlam quite plainly refused to use the playbook of Mackenzie King.

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[696] Kelly, Paul. The Unmaking of Gough. Angus & Robertson Publishers: Sydney, 1976. p. 9
[697] Ibid.
[698] Ibid.
[699] Henderson, Paul. Parliament and Politics in Australia: Political Institutions and Foreign Relations 4th Edition. Heinemann Educational Australia: Richmond, 1987. p. 89
[700] Hall, Richard. The Real Kerr, John: his brilliant career. Angus & Robertson Publishers: Sydney, 1978. p. 141

During the entire Constitutional Crisis Gough Whitlam maintained that any intervention by the Governor General, as called for by some, was moot, as he noted the day after the Senate declaration in an interview on *This Day Tonight*, hosted by Richard Carleton,

> Carleton: Sir, must Sir John Kerr accept your advice whatever advice you give him?
> Whitlam: Unquestionably, the Governor General takes the advice from his prime minister and from no one else.
> Carleton: And must act on that advice?
> Whitlam: Unquestionably, the Governor General must act on the advice of his prime minister.
> Carleton: There is no tolerance here, he must do…
> Whitlam: None whatever.
> Carleton: Fine. Well obviously there is dispute in the community, but your view is quite plain.[703]

Paul Kelly has argued that, "Whitlam's whole political strategy during the four-week Constitutional Crisis of 1975 was based on one fundamental linch-pin: the assumption that the Governor General would act only on the advice of his prime minister and not without the advice of his prime minister."[704] Kelly has added that the Governor General went out of his way to dupe the Prime Minister, by claiming that the crisis did not require his intervention when the Governor General clearly though otherwise.

What motivations did Sir John Kerr have in dismissing his Prime Minister Gough Whitlam? While the question of supply was perhaps disconcerting, at the time of

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[701] Walter, James. The Leader: A Political Biography of Gough Whitlam. University of Queensland Press: St. Lucia, 1980. p. 262
[702] Hall, Richard. The Real Kerr, John: his brilliant career. Angus & Robertson Publishers: Sydney, 1978. p. 134
[703] Kelly, Paul. The Unmaking of Gough. Angus & Robertson Publishers: Sydney, 1976. p. 274
[704] Ibid. p. 5

Whitlam's dismissal Australia had not yet run out of supply. Even if it had, Edward McWhinney cites a Canadian solution to the problem of supply, "In Canada, at both the federal and provincial levels, the obtaining of special warrants authorizing payments to finance governments during an election and until a new Parliament meets is an acceptable governmental practice achieved by order-in-council."[705] Paul Kelly notes, "The former Prime Minister declared that the possibility of CIA involvement in his dismissal could not be ignored."[706] This theory cannot be dismissed outright. Sir John Kerr did have connections to the Australian Security Services, which during the time of the Constitutional Crisis was undergoing a crisis of its own.[707] The Australian Security Services had strong connections to the American CIA. Some conspiracy theorists allege that Kerr was a CIA agent, or at the very least co-opted by the organization and that, the Whitlam dismissal was their bidding. During the security crisis, Gough Whitlam expressed great concern that the CIA was interfering in Australian affairs. However, Richard Hall has noted, "The theory that the CIA pressed a button and Kerr responded is too crude. They did not need to."[708]

Another possibility, perhaps more believable than the CIA connection, was the fact that Kerr himself feared that he would be dismissed by Gough Whitlam. Scholars such as Richard Hall and Paul Kelly support this belief. It was later discovered that during the Constitutional Crisis Sir John Kerr had informed his wife, Anne Robson (a.k.a Lady Kerr) that it might be necessary to notify Gough Whitlam that the Governor General might have to dismiss him as Prime Minister. The response from his wife was,

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[705] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005. p. 68

[706] Kelly, Paul. The Unmaking of Gough. Angus & Robertson Publishers: Sydney, 1976. p. 1

[707] The CIA Conspiracy Theory goes something like this: The CIA did not appreciate Whitlam withdrawing his country's support for the Vietnam War, his wanting to know the identities of all CIA agents working in Australia and what the purpose of the PINE GAP installation, which was located on Australian soil. Whitlam feared he was being used as a pawn in the United States nuclear chess match with the Soviet Union. This caused to alarm for the Americans. Thus, the CIA approached the Governor General of Australia Kerr, John and on November 11, 1975 dissolved parliament, dismissed Whitlam and appointed the official leader of the opposition as Prime minister. The Governor General happened to be a former OSS agent who worked in Washington during World War II and was connected with several admitted CIA front organizations.

[708] Hall, Richard. The Real Kerr, John: his brilliant career. Angus & Robertson Publishers: Sydney, 1978. p. 140

"No, don't do that. If you tell him, he'll sack you first."[709] On October 16, at a state dinner for the visiting Malaysian Prime Minister, Tun Abdul Razak, the political intrigues that had occurred domestically were a source of conversation. Razak had asked Whitlam what would happen if the Governor General and the Prime Minister were to differ on the matter. Whitlam joked that "It would be a race for the Queen."[710] While Whitlam would maintain that this was a joke, apparently Sir John Kerr did not find it a laughing matter. Another matter that troubled Kerr was the removal of the Governor of Queensland Sir Colin Hannah's "dormant commission."[711] As is Constitutional practice in Australia, the most senior State Governor has a commission to succeed the Australian Governor General in the event of incapacity or death.[712] This came after Sir Colin had criticized the federal government.

The legacy of the Whitlam intervention is one that is not favourable. The examination and the criticism of the Governor General in this instance perhaps prove a meaningless exercise in some respects, as the authority of the Governor General cannot be appealed. Nonetheless, Paul Henderson has argued that,

> From a convention viewpoint, he probably should not have intervened. One other major problem revolved around the actions of the Governor General concerning his methods and timing. For instance, Mr Whitlam has said he was never warned about any possible dismissal, and it has been argued that the Governor General should have waited until Supply actually ran out, probably in later in November. A common view was that he '...acted unwisely-not improperly or wickedly-in dismissing Mr Whitlam as he did and when he did.'[713]

Edward Schreyer has viewed the intervention of Kerr similarly, but does note that it serves as an important convention that demonstrates that the prerogative of dismissal of a Prime Minister by a Governor General is still active. "I just think he was wrong. It's ironic that I am one of these that believe that there are certain circumstance, limited mind you, but nevertheless some circumstances under which the Governor General would be right in taking action, not only right but if he had any respect for his office he would be obliged to take action."[714]

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[709] Kelly, Paul. The Unmaking of Gough. Angus & Robertson Publishers: Sydney, 1976. p. 5

[710] Hall, Richard. The Real Kerr, John: his brilliant career. Angus & Robertson Publishers: Sydney, 1978. p. 139

[711] Ibid.

[712] State Governors in Australia are roughly the equivalent of Canadian Lieutenant Governors. Australia also possesses Lieutenant-Governor's. However, these are essentially the Canadian equivalent to Administrators.

[713] Henderson, Paul. Parliament and Politics in Australia: Political Institutions and Foreign Relations 4th Edition. Heinemann Educational Australia: Richmond, 1987. p. 90

The Queen's Private Secretary would write on November 17, responding to calls for the Queen's intervention in the matter,

> As we understand the situation here, the Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor General as the representative of The Queen of Australia. The only person competent to commission an Australian Prime Minister is the Governor General…it would not be proper for her to intervene in person in matters which are so clearly placed within the jurisdiction of the Governor General by the Constitution Act.[715]

Kerr would take this as a sign of approval from the Queen. However, the Queen did not fully approve of Kerr's action. During some of the most serious demonstrations against Kerr in June and July of 1976 Buckingham Palace intimated through The Times that called for the appointment of Prince Charles as the Governor General of Australia.[716] As Richard Hall has noted "the piece was clearly inspired, and was not the subject of any denial from the Palace."[717]

Forsey would come to the defence of Sir John Kerr in Canada, responding to a Globe and Mail editorial Forsey would note,

> Your editorial on the Australian Constitutional Crisis (A Bonus Election for Mr Whitlam-Nov.17) appears to rest on the belief that 'in the monarchies if the British Commonwealth…the Crown is expected to exercise' its sovereignty only on the advice of its selected advisers'. Ordinarily, yes: but not always. 'The Queen can do no wrong.'[718]

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[714] Ed Schreyer Telephone Interview June 26, 2006 9:30-10:30 pm

[715] Kerr, John. Matters for Judgment: An autobiography. The MacMillan Company of Australia: Melbourne, 1978. p. 374-75

[716] Hall, Richard. The Real Kerr, John: his brilliant career. Angus & Robertson Publishers: Sydney, 1978. p. 143

[717] Ibid.

[718] Kerr, John. Matters for Judgment: An autobiography. The MacMillan Company of Australia: Melbourne, 1978. p. 210

The intervention was inappropriate, especially since it came prior to the running out of supply; it was perhaps a blessing in disguise as it re-established without question that the prerogative powers of the Governor General are still in effect.

There are also other federal examples of a Governor General's intervening after Kerr. For instance, in February 1983, the Australian Prime Minister Malcolm Fraser requested that the Governor General Sir Ninian Stephen call a double dissolution after the Australian Senate had blocked 13 bills sent from the House of Representatives. The Governor General, instead of initially granting the Prime Minister's request, asked for a more studied explanation. As Paul Henderson has argued, "Following deliberations the request was granted, but the incident again shows quite clearly that it cannot be taken for granted that a Governor General will automatically do as the Prime Minister requests." [719]

B. 2006 Disallowance Returns

In Canada, the Lieutenant Governors ability to reserve or the Governors General ability to disallow provincial legislation is thought inoperative. However, in Australia, , disallowance, has been used periodically in the contemporary period, the most recent occurrence coming in 2006. In March 2006, the Australian Capital Territory (ACT), proposed the *Civil Unions Bill* 2006, which would grant equality for wills and property to same-sex couples. As a state, the legislation would only be effective within the Australian Capital Territory. Nonetheless, the Prime Minister and the federal Attorney General Philip Ruddock claimed that the proposed legislation would create parity between civil unions and marriage, which would violate the federal *Commonwealth Marriage Act.*[720] The Federal government threatened to reserve the legislation if it passed. As David Shucosky noted, "Under Australian law, territorial legislation can be vetoed by the federal government, but that has not been done since 1997, when Canberra vetoed a Northern Territory bill on euthanasia."[721] However, it would be a bit of a misnomer to claim that this a federal government veto, as in truth, the Governor General of Australia exercises this veto. The ACT must abide by the *Australian Capital Territory (Self-Government) Act* 1988. Section 35, of which, outlines the requirements for disallowance," (2) Subject to this section, the Governor-General may by written instrument disallow an enactment within 6 months after it is made," and the Governor General does also possess the ability to recommend amendments, "(4) The Governor-General may, within 6 months after an enactment is made, recommend to the Assembly any amendments of the enactment, or of any other enactment, that the Governor-General considers to be desirable as a result of considering the enactment."[722] While the ability for the Governor General to amend legislation is not present in the *Constitution Act*, 1867, the ability to disallow legislation is. The Australian turn of events would have implications for Canada. Despite the warnings by the federal government, the ACT would eventually pass and get Royal Assent in May 2006.

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[719] Henderson, Paul. Parliament and Politics in Australia: Political Institutions and Foreign Relations 4th Edition. Heinemann Educational Australia: Richmond, 1987. p. 89

[720] Shucosky, David . "Australia federal government threatens veto of ACT civil unions bill. " Jurist Online. March 30, 2006 http://jurist.law.pitt.edu/paperchase/2006/03/australia-federal-government-threatens.php

The federal government reaction would be forthcoming in June 2006. On June 7, 2006, Prime Minister John Howard announced that the Commonwealth government would be moving to have the legislation disallowed,

> Well I can indicate that the legislation by its own admission is an attempt to equate civil unions with marriage and we don't find that acceptable. Our view is very simple and that is that the founding fathers in their wisdom gave Constitutional authority in relation to these matters to the Commonwealth. We legislated in a bipartisan fashion to define marriage and we are not prepared to accept something which is a plain attempt to equate civil unions with marriage and we don't agree with that. ...[723]

On June 12, Wayne Berry, the Speaker for the ACT Legislative Assembly appealed to the Governor General, Major General Michael Jeffrey, not to disallow the legislation, "The Federal Government has decided for partisan political reasons to intervene on a law which removes discrimination."[724] He proposed that the Governor General make recommendations or amendments instead. Berry did concede that the Governor General would likely follow the advice of the Commonwealth (federal government), rather than the ACT, "The Assembly has made the point that it would rather not have its laws trampled upon and of course it has asked the Governor-General to come forward with that recommendation, but of course the Governor-General will be subject to the advice of the Federal Government and we'll have to wait and see."[725] In the end, the Governor General, Major General Michael Jeffrey, acted on the advice of the Commonwealth and disallowed the legislation. On June 16, the final hope for the *Civil Unions Bill* 2006 was dashed after the Australian Senate voted down a motion that would have overturned the Michael Jeffrey's disallowance. The ability to override the Governor General's disallowance is a curious provision that is not present in Canada. The word of the Governor General is final.

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[721] Ibid.

[722] *Australian Capital Territory (Self-Government) Act 1988, section 35*

[723] Shaulis, Joe . "Australia federal government to strike down civil unions law in capital district. " 2006 Jurist Online June 07, http://jurist.law.pitt.edu/paperchase/2006/06/australia-federal-government-to-strike.php

C. Governors in Australia

The Australian precedent of vice-regal intervention is not limited to the Federal level. Historically, the Governors in Australia of the constituent Australian states are not irrelevant. One instance where a Governor refused the advice of the Premier occurred in 1923. The Tasmanian Governor refused to dissolve the legislature when the government lost control of the house following a defection. In 1932, the New South Wales Governor Philip Game dismissed Premier Jack Lang, after his government defaulted on its debt and subsequently found to be "committing a breach of law," as it refused to reimburse the federal government, which had covered the state's debt. In 1952, the Victorian State Governor denied the request of a Premier for dissolution.

More recently, there is evidence of State Governors in Australia refusing the advice of their ministers and departing from Parliamentary convention. Sir Walter Campbell, the Governor of Queensland, refused in 1987 to accept the advice of the

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[724] ABC. "ACT urges G-G not to overturn civil union laws. " ABC.net June 13, 2006 http://abc.net.au/news/items/200606/1661641.htm?act

[725] Ibid.

Premier Sir Joh Bjelke-Petersen to dismiss his ministry. Campbell thought that Bjelke-Petersen's National Party was on the verge of deposing him. He had therefore lost the confidence of his Party and therefore the confidence of the Assembly. Since Queensland does not possess a Legislative Council, the Governor must be especially deliberate in his actions. In 1989, Sir Phillip Bennett, Governor of Tasmania, refused to grant another election to the Liberal Premier Robin Gray after an election had not established a clear majority.

Grenada

D. Sir Paul Scoon

The role of the Governor General in Canada in an emergency could be theorized by the events that occurred in Grenada during the late 1970's to the early 1980's. Grenada is a small island located in the Caribbean covering some 133 square miles and in the period described had a population of 110,000. It was a former colony of Britain and after independence in 1974, it retained Queen Elizabeth II as head of state and a Governor General continued to represent her.

In March of 1979, Maurice Bishop led New Joint Endeavour for the Welfare, Education and Liberation (Jewel) in a coup d'etat that overthrew the Constitutional government of Grenada led by Prime Minister Eric Gairy who was on a visit to New York at the time. Eric Gairy was later described as indefensible making it problematic to justify a return of his government and the overthrow of Bishop. Anne Marie Davis recounts, "Sir Eric Gairy sought to hold on to his political powers at all cost rather than solve the socio-economic problems of Grenada." Grenada was a country "plagued with illiteracy, unemployment, emigration and disease. In addition, Grenadians witnessed decades of corruption and bribery."[726]

The New Joint Endeavour for the Welfare, Education and Liberation had served as the opposition in the Grenadian Parliament before the coup and subsequent to it formed a People's Revolutionary Government. While Jewel had initially widespread popular support, the regime began to become increasingly unpopular as it suspended elections indefinitely as well as the freedom of the press among other political freedoms. Included was the suspension of habeas corpus and the 1973 Constitution under which "the Governor General had enjoyed broad executive powers." Instead, People's Laws replaced the Constitution and the position of the Governor General altered to "perform such functions as the People's Revolutionary Government may from time to time advise."[727] Bishop promised the suspension of rights, including the 1973 Constitution, would be temporary. Bishop also conveyed this message to the Organization of Eastern Caribbean States (OECS). In response, the organization argued for non-intervention. The OECS was comprised of seven nation-states, which shared a common market and even some "common administrative, diplomatic, and judicial and defense functions."[728] A Bishop representative sent to an OECS meeting pledged a return of civil liberties and free elections. This promise turned out to be disingenuous as Grenada began to slip further and further away from democracy. By 1983 some 3000 Grenadian's had been imprisoned for political opposition to the Bishop Regime and habeas corpus was suspended also. Grenada also began to align itself with the Communist block including the Soviet Union, Cuba, Bulgaria, East Germany and North Korea and its heavy military build-up was perhaps indicative that Bishop expected to expand his revolution into the other OECS states.

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[726] Davis, Anne Marie. "United States Foreign Policy Objectives and Grenada's Territorial Integrity. " The Journal of Negro History, Vol. 79, No.1 Winter 1994. p 94

On October 12, 1983, the Deputy Prime Minister Bernard Coard overthrew Maurice Bishop in a military coup. A week later, Bishop, along with others members of the Grenadan government were executed. A 16-member Revolutionary Military Council formed and the Commander of the Army General Hudson took "nominal" control over the government. Most disconcerting was the implementation of a 24 hour, '"shoot-on sight curfew" which was imposed against civilians."[729] Again, concern was raised that this disorder would spread throughout the region.[730] At this point, the Governor General of Grenada secretly transmitted "an appeal for action by the OECS and other regional states to restore order on the island."[731] The OECS and the Governor General appealed for the assistance of the U.S government and the Reagan administration. in a BBC interview which aired October 31st Paul Scoon recounted his motivations for calling outside intervention on October 23rd,

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[727] Joyner, Christopher C. "Reflections on the Lawfulness of Invasion." The American Journal of International Law, Vol. 78, No.1 January 1984 p. 138

[728] Moore, John Norton "Grenada and the International Double Standard" The American Journal of International Law, Vol. 78 No.1 January 1984 p. 147

[729] Joyner, Christopher C. "Reflections on the Lawfulness of Invasion." The American Journal of International Law, Vol. 78, No.1 January 1984 p. 131-132

> Later on, as things deteriorated, I thought, because people were scared, you know. I had several, you know. I had several call from responsible people in Grenada that something should be done: "Mr. Governor General, we are depending on you [that] something be done. People in Grenada cannot do it, you must get help from outside." What I did ask for was not an invasion but help from outside…I asked for help from the OECS countries. I also asked the OECS to ask American whether they can help, and then I confirmed this in writing myself to the President of the U.S.A.[732]

The Reagan administration viewed the Royal Prerogatives of the Governor General of being in continued effect. On November 2, 1983, Kenneth Dam, the United States Deputy Secretary, confirmed this, stating before the House Foreign Affairs Committee that the: "legal authorities of the Governor General remained the sole source of governmental legitimacy on the island in the wake of the tragic events…The invitation of lawful governmental authority constitutes a recognized basis under international law for foreign states to provide requested assistance."[733] The response to Governor General Scoon's appeal came from the militaries of the United States and the OECS who invaded Grenada. By October 30, the revolutionary military council government and its forces were destroyed.

There was no stability after the invasion. There was an absence of any semblance of governance. Therefore, the Governor General declared a state of emergency and began to issue proclamations to return Grenada to a state of democracy. On November 4, 1983, the Governor General issued Proclamation 3, returning fundamental rights provided by the 1973 Constitution and laws, which had been introduced by the People's Revolutionary Government continued to be in force unless they contradicted the Governors General's orders, which included People's Laws Nos. 4 and 14.[734]The Governor General was in effect the administration and government of Grenada until a general election could be held on December 6, 1984.[735] The Supreme Court of Grenada "confirmed the intervention by the Governor General by reference to the doctrine of necessity."[736]Haynes P Liverpool, a judge with the appellate court, would later note of Sir Paul Scoon's intervention, "In my view, the circumstances as a matter of practical reality were tailor-made for the assumption of control by the Governor General…It would have been a betrayal of his country if he had not done so."[737]

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[730] Ibid.

[731] Ibid.

[732] Transcript of BBC-TV interview with Grenadan Governor-General Sir Paul Scoon on "Panorama," October 31, 1983

[733] Joyner, Christopher C. "Reflections on the Lawfulness of Invasion." The American Journal of International Law. Vol. 78, No.1 January 1984 p. 137

Some critics have argued that the suspension by People's Law No.1 of the 1967 Constitution limited the authority of the Governor General to appeal for help, as the constitution provided "…powers that might have validated his invitation for outside intervention."[738] This suggestion that somehow his actions were illegitimate, while a revolutionary government that overthrew a democratically elected order and possessed little respect for human rights and life somehow was legitimate in their formulation of laws is questionable. This argument can be disputed on several fronts. Firstly, the ability of an unelected revolutionary government to dismiss a Constitution arrived upon democratically, can be disputed. Under international law, a revolutionary government must establish a new legal grundnorm for its laws to be considered legitimate. While the Jewel movement was indeed revolutionary and attempted major change in Grenada, and arguably did so, one ironic aspect where the old grundnorm persisted was the office of the Governor General, which conflicted with Bishop's assertion that the Westminster Parliamentary system was in Grenada "a dead corpse."[739]The failure of the new regime to remove the position of Governor General, an office symbolic of a Constitutional democracy, re-established some old norms. Additionally, the post-1983 Grenadians eagerly embraced democracy indicating that the people did not accept the grundnorm of the revolutionary government. Secondly, the Governor General, as the personal representation of Her Majesty Queen Elizabeth II possesses certain prerogative powers outside of the constitution derived from Commonwealth law and tradition which would have allowed for calls for outside intervention and dismissal of the Bishop government among others. The prerogatives the Governor General of a Commonwealth was recognized by the United States as a legitimate source of legal power. As such, the United States listened and acted on Scoon's plea for help establishing an international norm that recognizes the importance of the prerogative powers of the Governor General.

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[734] Smart, p. St. J. "Revolutions, Constitutions and the Commonwealth: Grenada. " The International and Comparative Law Quarterly, Vol. 35No. 4 October 1986 p. 952
[735] Ibid.
[736] Ibid.
[737] Ibid.
[738] Joyner, Christopher C. "Reflections on the Lawfulness of Invasion." The American Journal of International Law, Vol. 78, No.1 January 1984 p. 138
[739] Pastor, Robert A. "Does the United States Push Revolutions to Cuba? The Case of Grenada. " Journal of Interamerican Studies and World Affairs, Vol. 28, No. 1 Spring 2006 p. 19

The intervention by Sir Paul Scoon was undoubtedly required. However, there were concerns over the lack of action of the Governor General prior to 1983. The rise of a revolutionary government that supplanted a democratically elected one should have immediately called for a request for outside assistance to vouchsafe Grenadan democracy. Perhaps not immediately, if the revolution was a proper will of the people, but in the Grenadan example, it certainly did not. As Scoon himself admitted, had he called elections Bishop most certainly would have not won. Scoon's concern for his personal safety quite possible motivated his actions. In the initial revolution in 1979, the Governor General Sir Paul Scoon was arrested and released. Edward McWhinney has noted,

> In some personal danger after the events of 1979, the Governor General seems to have acquiesced passively in the effective transfer of power the coup created. Scoon had little choice. With the later 1983 coup, however, he moved more boldly to fill the power vacuum created by the murder of the prime minister and cabinet members.[740]

Why Scoon chose not to intervene earlier by calling in the assistance of the OECS, U.S or even Great Britain, which had served, as Grenada's political master until 1974, is uncertain? Britain had recently triumphed against the more formidable Argentina in the

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[740] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005. p. 90

Falklands and had "quietly sent a naval frigate to Grenada" as an immediate reaction to the coup. The British Prime Minister James Callaghan called his counterpart in Barbados, Tom Adams, for his opinions on the matter.[741] One answer is that the prior government of Sir Eric Gairy, although elected, was arguably no less brutal than the Bishop regime that followed. The Governor General was perhaps more sympathetic to a tyrant who was at least initially concerned himself with the well-being of his people. Perhaps, it was only with the counter-coup in 1983 that the Scoon felt things had truly gotten out of hand.

The Grenada case study illustrates the importance of the military to be loyal to the Commander-in-Chief. A democratically elected government may be overthrown. The loyalty of the military to the Governor General is a coercive element to any potential usurper. In the context of Canada, there is not a clear set of orders, at least officially. A call to the Judge Advocate General at the Edmonton Garrison indicated that in a conflict between a Governor General and a Prime Minister the actions and loyalty of the military would require careful research. However, an argument can be made that the *Letters Patent*, 1947 would compel the military to act in such a way that would oblige the military to be loyal to the Governor General. As well since every Canadian Forces member has sworn allegiance to Her Majesty, members would perhaps be more willing to follow her representative than the Prime Minister. However, this is also contingent on the person of the Governor General, military men and women may be more sympathetic to Adrienne Clarkson than Michaëlle Jean.

The Grenada case study also illustrates the legitimacy of the Governor General to act without ministerial advice under international law. It also illustrates that should the powers of the Governor General removed by constitution or statute that certain prerogative powers would nonetheless be subsisting and effective. This perhaps illustrates that as long as Canada is formally a Constitutional Monarchy the Governor General will be possessed with prerogative powers.

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[741] Pastor, Robert A. "Does the United Push Revolutions to Cuba? The Case of Grenada. " Journal of Interamerican Studies and World Affairs, Vol. 28, No.1 Spring 1986 p. 6

E. Preliminary Conclusions

Commonwealth precedents are important to the study of the vice-regal role in Canada. The size and diversity of the Commonwealth has provided for some interesting precedents that have implications for Canadian vice-regal action.

Australia has historically proved a good corollary study. It possesses a similar political system and tradition to that of Canada. One of the most important Australian precedents in the 20th Century was the dismissal of Gough Whitlam by Governor General Sir John Kerr in 1975. This occasion provided direct evidence that a Governor General could dismiss a Prime Minister in modern times. The dismissal itself was not over a serious breach of Constitutional law or convention. It came out of a dispute over the supply of funds. This demonstrates that dismissal is entirely at the discretion of the Governor General. The use of reservation in Australia, most recently exercised in 2006, establishes a precedent for a potential Canadian usage in modern times. The activities of Governors in Australia provide further credence to the argument that vice-regals are politically relevant in the modern era.

Additionally, during the crisis in Grenada in 1983 there was significant vice-regal intervention. These interventions provide some insight on the role of the Governor General in the event of an extremely destabilizing crisis. During this crisis, the Governor General was forced to take charge and even legislate until law and order could be restored.

Chapter IX: Limits on GG and LG. Loyalty to the First Minister?

A. Some problems with patronage

While the broad and legal basis for intervention of the Queen's representatives has been demonstrated, it is also necessary to note a concern that vice-regals may be too loyal to the first ministers, especially to the one that appointed them. Some scholars like Frank Mackinnon argue that the selection of Governors General and Lieutenant Governors have become too partisan, raising several problems. Firstly, "a governor who owes his job to the Prime Minister might tend to tread softly when facing a crisis involving his benefactor."[742] Eugene Forsey held a stricter view of this sentiment, "It is precisely because the Governor General has certain reserve powers, because he can, in very special circumstances, refuse advice of his ministers, that it is desirable to have a Governor General with no past connection with any Canadian political party."[743] Secondly, a Prime Minister might ostracize a Governor General or a Lieutenant Governor appointed by the former Prime Minister. A Prime Minister may appoint a Lieutenant Governor that had been a prominent provincial member of his party.

The cooptation of a Governor General is a paramount concern. Edmond Butler is reputed to have said: "the Governor General should never seem to be in the PM's pocket."[744] As discussed earlier, the Governor General, as a legal equivalent to a viceroy is immune from any legal mechanisms, save the Canadian monarch. Their power is near absolute. For instance, the Governor General could grant legal immunities to a Prime Minister in the face of blatant illegalities and the courts would be powerless to halt it. Christopher Young has argued that the current arrangement of appointments is disconcerting, "Regardless of individuals, there's a fundamental flaw: the Governor

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[742] Fischer, Doug. "Hnatyshyn was vice-regal hit: But Governor-General is leaving an office diminished by politics"; [Final Edition] Calgary Herald. Calgary, Alta.: Feb 5, 1995. p. A.10

[743] Hodgetts, J. F. The Sound of One Voice: Forsey, Eugene and his Letters to the Press. University of Toronto Press: Toronto, 2000. p. 120

[744] Howard, Frank . "Appointment of secretary to GG raises concerns;" [Final Edition] The Ottawa Citizen. Ottawa, Ont.: Jul 19, 1990. p. A.4

General is chosen by the prime minister, not the Queen. What could be more undemocratic? Or open to abuse?"[745]

Frank Mackinnon's concern of the benefactor relationship is readily apparent. The appointment of Ray Hnatyshyn as Governor General in 1989 serves as a good example of this. Ray Hnatyshyn, had until his defeat in the 1988 elections been a cabinet minister in Brian Mulroney's government. As William Gold wrote in the Calgary Herald on October 20, 1989, "One writer even went so far as to suggest that Hnatyshyn would be so beholden to Mulroney for this job that he would improperly favour the man in the event of a Constitutional impasse of the rare sort that only a Governor General can resolve."[746] The concern came to the fold in 1992 when Hnatyshyn intervened in the Constitutional debate over the senate. Don Getty was unwilling to agree to the Charlottetown accord unless it included a Triple-E Senate, which needed to be "effective, equal and elected." As he would later argue, "We are strong Canadians here…and we think a Triple-E Senate will lay the foundation for a better foundation."[747] After Getty refused to meet with Joe Clark, the Conservative Minister of Constitutional Affairs, the Governor General was sent to convince Premier Getty to change his hard line position. As Don McGillivray noted, "The Governor General was reported to have held a 45-minute meeting behind closed doors with Premier Don Getty of Alberta in what was described as a vice-regal effort to get Getty to compromise on the Senate question."[748] Hnatyshyn noted that his desire was to "try and sense what's happening," in the Constitutional debates.[749] Concerns arose that the Governor General was being employed in a political matter little different than his immediately previous career as a cabinet minister. In that capacity, Ray Hnatyshyn had played a prominent role during the previous proposed Meech Lake Constitutional reforms. Robert MacGregor Dawson has termed the use of vice-regals in this fashion as 'mediation'. Dawson, summarizing the historic use of 'mediation' notes, "Efforts of this kind rarely meet with more than a modicum of success."[750] Another concern with respect to Canada's federal system would be that the Governor General or the Lieutenant Governors might be inclined to use their prerogative powers to persuade Premiers at the behest of the Prime Minister. The Office of the Governor General should remain separate from the Office of the Prime Minister. In 1995, Preston Manning would boycott the swearing-in ceremony of Governor General Romeo Leblanc citing concerns. "I don't mean any disrespect to the individual or the office, I feel uncomfortable about the patronage nature of it and the tax privileges that go along with it."[751] Such a boycott had been unprecedented in Canadian history.

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[745] Young, Christopher. "Head-of-state role needs an overhaul; Institution in decline; [Final Edition]" Edmonton Journal. Edmonton, Alta.: Jan 28, 1993. p. A.11

[746] Gold, William. "Knocks on Hnatyshyn really aimed at Mulroney; [Final Edition]" Calgary Herald. Calgary, Alta.: Oct 20, 1989. p. A.5

[747] Geddes, Ashley. "Getty won't budge on Senate; [Final Edition]" Calgary Herald. Calgary, Alta.: Apr 10, 1992. p. A.11

[748] McGillivray, Don. "Hnatyshyn following in duke's footsteps; [Final Edition]" Calgary Herald. Calgary, Alta.: Apr 16, 1992. p. A.4

[749] Ibid.

In 1996, the partisan nature of Lieutenant Governors and their loyalty to their benefactors became clear in a dispute between a former Conservative Lieutenant Governor, Gordon Towers, and a serving Liberal Lieutenant Governor, Bud Olson. The dispute arose after Olsen decided to move the traditional site of the New Year's Levee from Government House in Edmonton to his hometown of Medicine Hat. The former Lieutenant Governor, Gordon Towers, complained in the press about the move saying, "There's lots of times I would like to have been in Red Deer on Armistice Day, but every Nov. 11 I was in Edmonton because it was the capital city."[752] Bud Olson responded by saying, "He's not Lieutenant Governor anymore. I don't give a damn what he thinks."[753]Towers responded in kind with a petition to have Olson removed as Lieutenant Governor saying that he had used "degrading language." Olson noted that Tower's motivations were political, "He can advocate my resignation or departure if he wants but he has no influence on anybody that counts. He's a lightweight and I don't care what he thinks, I'm going to have it in Medicine Hat."[754]

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[750] Ibid.

[751] "Manning skips Gov. Gen.'s gala; [FINAL Edition]" Edmonton Journal. Edmonton, Alta.: Feb 9, 1995. p. A.3

[752] Chase, Steve. "This Bud's for them! Olson takes New Year's levee south." Edmonton Sun. November 30, 1996 p. 3

[753] Ibid.

[754] Ibid.

Ashley Geddes of the Edmonton Journal hinted "that trouble could be brewing on the horizon is with the provincial government, where Olson's credentials as a Liberal appointed to two plum patronage posts -- first the Senate and now the Lieutenant Governor's job -- are viewed with some disdain."[755] One prominent Conservative Alberta MLA and cabinet minister at the time, Lorne Taylor, criticized the Liberal Lieutenant Governor, "I don't think we need one…they live off the Alberta taxpayer. Quite frankly, I don't think it's a necessary office."[756]

Despite evidence of vice-regals being beholden to Prime Ministers, there is evidence that they may act contrary to the wishes of the Prime Minister who advised the appointment. The activities of Edward Schreyer under Pierre Trudeau are but one glaring example. Schreyer had been a lifelong socialist and a New Democrat Premier for Manitoba. Prime Minister Jean Chrétien in his appointment of Adrienne Clarkson recruited a Governor General that was an outspoken critique of his government's policies, especially with respect to cuts to the CBC and its handling of the Quebec referendum. Maude Barlow went so far as to accuse Chrétien of attempting to silence her,

> She has shown that the office of Governor General isn't only for the elite, said Barlow, who considered the post "totally irrelevant" until now. Clarkson is walking a fine line, Barlow acknowledged, but "it's a fine line for anybody who has a mind, because you're really basically told to put your mind away while you're a Governor General.[757]

However, it could be argued that Chrétien ensured that a critique of his government would serve as a check and balance on his government.

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[755] Geddes, Ashley. "'I expect to be in trouble all the rest of my life'; Bud Olson, lieutenant-governor of Alberta, former Liberal Cabinet minister, unrepentant pragmatist, has always said what he thinks. If that gets him in trouble; THE OLSON FILE; [FINAL Edition]" Edmonton. Dec 15, 1996. p. F.3

[756] Geddes, Ashley "Tempest over a tea party; Lieutenant-governors' tiff shows no sign of weakening; LEVEE AT CITY HALL? [FINAL Edition]" Edmonton Journal. Edmonton, Alta.: Dec 5, 1996. p. A.1

[757] "Governor-General's advocacy is raising hackles. "[Final Edition] Examiner. Barrie, Ont.: Jan 22, 2001. p. A.8

B. Some Ceremonial Usurping

First Ministers have occasionally ostracized their vice-regals, or treated them dismissively, even with respect to their ceremonial role. Christopher Young has recounted that, "Before the Shamrock Summit with Ronald Reagan in 1985, then-Governor General Sauvé was mightily miffed when Mulroney ordered her to stay away, though protocol required her presence to greet a head of state."[758] On September 7, 1981, Edward Schreyer hosted an opening dinner for the Constitutional Conference between Prime Minister Trudeau and the ten premiers. The dinner did not have any semblance of any conciliatory nature as Trudeau recounts, "finally that dinner seemed so endless I asked the Governor General if we could hurry up with dessert because I wanted to go home and do some work."[759] Steven E. Paproski, the Member of Parliament for Edmonton North, accused Prime Minister Trudeau of relegating the Governor General to the role of salesperson for Canada's Candu reactors in the House of Commons on February 19, 1982, "Can the Prime Minister advise the House if the "G.G" is now one of his salesmen for Candu reactors?"[760] Pierre Trudeau ducked the question noting, "Madame Speaker, I imagine it would be against the rules of the House to draw the monarchy into this matter."[761]

On June 15, 1905, new *Letters Patent* issued made the Governor General Commander-in-Chief of Canada.[762] This function of Commander-in-Chief applied properly does assist the morale of the Canadian Forces. Adrienne Clarkson reinvigorated the role of the Governor General as Commander-in-Chief. As noted by Tim Naumetz, "In 2002, Clarkson became the first Canadian Governor General to visit Canadian troops deployed to conflict zones abroad."[763] John Ward would note, "When Canadian soldiers were killed and wounded last year by an errant bomb in Afghanistan, she flew to

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[758] Young, Christopher. "Head-of-state role needs an overhaul; Institution in decline; [Final Edition]. Edmonton Journal. Edmonton, Alta.: Jan 28, 1993. p. A.11

[759] Trudeau, Pierre. Trudeau: Memoirs. McClelland & Stewart,1993. p. 303-6

[760] Canada, House of Commons, *Debates*. (February 19, 1982) p. 15189

[761] Ibid.

[762] http://www.gg.ca/gg/rr/cc/hist_e.asp

[763] Tim Naumetz. "Well-travelled Clarkson not just a figurehead: High expenses created controversy;" Edmonton Journal. Edmonton, Alta.: Aug 5, 2005. p. A.10

Germany to visit the injured. When the dead arrived home, she filled the role of chief mourner."[764] When Clarkson was met with criticism, Andrew Cohen defended her, citing her important contribution to the military:

> While the prime minister and everyone else in official Ottawa was on holiday in December, Madame Clarkson and John Ralston Saul were in Afghanistan. They were spending the holiday season with our soldiers, as they have for the last four years in Kosovo, Bosnia, the Persian Gulf and Kabul. No other vice-regal couples did this; as commander-in-chief, Madame Clarkson and Mr. Saul have a deep affection for the military, which the military appreciates. In their sixth year, they refuse to treat their job as a sinecure.[765]

Clarkson's efforts were valued by the military and they won her praise from the public as well. At the end of her term, Adrienne Clarkson was feted to "an unprecedented tribute from the Armed Forces for being a commander-in-chief who reconnected Canadians to their military."[766]

There have been concerns that a Governor General would eclipse a Prime Minister in practising the ceremonial role of office. This occurred in 2006, when Governor General Michaëlle Jean who sought to visit Afghanistan in her capacity as Commander-in-Chief, and made a request to the Harper government to do so in January. The Prime Minister may deny the exit of the Governor General under Article XIV of the *Letters Patent*, 1947, providing that the intentions are not malicious. If they are, however, the Governor General under his prerogative powers and Article IX of the *Letters Patent*, 1947 can command the Prime Minister's obedience. As the Times-Colonist reported later, "One source with knowledge of the discussions said the Governor General's initial interest in going to Afghanistan was greeted enthusiastically by military officials, who saw the journey as a morale booster."[767]Despite this, strong arguments were made that the Governor General not to travel to Afghanistan. There was concern for her personal security and that any visit might disrupt Canadian military operations.[768] After this denial, Stephen Harper and his defence minister made a surprise visit to Afghanistan that earned him wild acclaim from the Canadian media and public. Once again, Jean made another request, which was denied again, for security concerns. Yet, after this trip, Peter Mackay made a surprise visit to Afghanistan. These trips raised serious questions: if it was safe for the Prime Minister, the defence minister and the foreign affairs minister - who brought along with him Members of Parliament New Democrat Alexa McDonough and Liberal Bryon Wilfert -, why was it not safe for the Governor General?

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[764] Ward, John. "Clarkson unfairly condemned for $1M trip, academics say. " Edmonton Journal. Edmonton, Alta.: Sep 29, 2003. p. A3

[765] Cohen, Andrew. "It's open season on Clarkson. " The Ottawa Citizen. Ottawa, Ont.: January 25, 2005. p. A.14

[766] "Forces laud outgoing Governor-General. " Calgary Herald. Calgary, Alta.: September 22, 2005 p. A.8

[767] "Afghan visit too dangerous, Governor-General is warned;" [Final Edition]Times - Colonist. Victoria, B.C.: May 31, 2006. p. A.5

Allegations that the Prime Minister was playing politics with Afghanistan and the Governor General did have some merit. Ujjal Dosanjh, the Liberal defence critic, cited the importance of the commander-in-chief visiting the troops to raise morale, "I think it's important the commander-in-chief of our Forces is allowed to visit those Forces, no matter what the circumstances are."[769] The rationale for not allowing Jean to travel to Afghanistan could be political, "That's not necessarily a photo-op the Conservatives can use in the next election."[770] The highly photogenic Jean could eclipse Harper's own visit to Afghanistan and perhaps that is something the PMO is unwilling to tolerate in a minority situation. The Prime Minister was criticized on his trip to Afghanistan for his heavy paunch, as some in the media thought the Prime Minister should be setting a better tone for all Canadians with respect to healthy living and fitness. Jean who is trim and toned does not have a problem in this respect. The influence of the Prime Minister is clear with respect to visits abroad by the Governor General. The concern over the clash over the symbolic role is a bit disconcerting, since it is no longer acceptable to exercise any independence in the political role, the lack of discretion in the ceremonial role illustrates that the political executive has taken control of that aspect of the Office as well.

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[768] Ibid.
[769] Ibid.
[770] Ibid.

C. Following the advice of the First Minister into trouble

Governors General have found themselves in trouble after following the directions of the government. In 1990, Governor General Ray Hnatyshyn would spark outrage when he attended the Coronation ceremony of the Emperor of Japan instead of attending Remembrance Day ceremonies in Ottawa to honour Canada's war dead and veterans. Hnatyshyn had been instructed to do so by the Mulroney government. However, critics did not make this distinction. Nick Massaro, a Hong Kong veteran who spent some 1,335 days as a Japanese prisoner in appalling conditions, chortled that he was "disgusted" and felt that other veterans felt the same: "[any veteran] who is still alive and kicking will be damn mad, too. But what can we do except say 'What the hell's going on."[771] A representative for the Royal Canadian Legion noted that this would mark the first time since 1945 that a Governor General did not attend ceremonies in Ottawa, with the exception of 1974 when Governor General Jules Léger was too ill to attend.[772] The Legion spokesperson continued by saying that Hnatyshyn was remiss in his duties as Commander in Chief of the Canadian Forces and should have been in Ottawa instead of Yokohama, Japan on Canada's most hollowed day.[773] Brian Mulroney did not rush to the aid of his friend as Prime Minister.

Alberta's highly popular Lieutenant Governor Lois Hole died on January 6, 2005. Hole was a highly popular Lieutenant Governor and with her death widespread sadness was felt across the province. However, another emotion would soon supplement the sadness: anger. Anger over the announcement that Canada's Governor General, Adrienne Clarkson, would not be able to attend the memorial service scheduled for January 18, 2005 in Edmonton. This desire would cause outrage from politicians across the province. The Conservative MP for St. Albert John Williams would angrily declare, "It's outrageous. I was shocked and disappointed. I can't believe she would put a personal engagement over her obligation as Governor General. Lois Hole was the best and most popular Lieutenant Governor we've ever had. Obviously, she (Clarkson) doesn't care about Alberta or the West."[774] The spectre of western alienation was clear as Williams would continue, “"If it was a memorial service for the Lieutenant Governor of Ontario or Quebec, you can be pretty sure she would break whatever personal engagement she has to be there."[775] Other political critics included the Toronto Sun and Andrew Cohen,

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[771] Hunter, Iain. "Hnatyshyn's absence disgusts war veterans; [FINAL Edition]". The Windsor Star. Windsor, Ont.: Nov 6, 1990. p. A.2

[772] Ibid.

[773] Ibid.

> The Toronto Sun, "the Empress of Excess was merrily vacationing with haughty hubby." The "prior commitment" that had kept her from the funeral "was mainly to her own leisure." The Sun predicted that this faux pas was "bound to land our jet- setting GG in hot water with politicians and the public yet again," and it said that her reasons for missing the funeral "have the strong scent of vice-regal crock."[776]

What all the political rhetoric missed was some basic facts. Most of the media was missed the close relationship between Hole and Clarkson, If they had been aware of this they would not have criticized Clarkson who, “admired Ms. Hole greatly, comforted her during her illness, and meant her no disrespect by her absence."[777]The media also failed to recognize that Clarkson's official duties abroad prevented her from attending the funeral. Adrienne Clarkson had spent the holidays visiting troops in Afghanistan before briefly cancelling her vacation to fly to Canada on January 8 to attend a memorial service for the tsunami victims. Afterward, she travelled to Europe, for a scheduled visit with the Queen on January 19. She was also to attend the inauguration of the President of the Ukraine, a date not fixed, given the controversy surrounding the elections. Edward McWhinney defended Clarkson's absence at the Lieutenant Governor's funeral,

> In strict protocol terms, the two offices of Governor General and lieutenant governor are distinct. The Governor General's mandate comes from the Queen, the Lieutenant Governor's from the federal government. Therefore, at a Lieutenant Governor's funeral, the federal government would be properly represented by the prime minister or his delegate, normally a federal minister.[778]

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[774] Johnsrude, Larry. "Clarkson's absence at Holes Funeral 'outrageous:' critics;" Regina Leader Post. Regina, Saskatchewan. January 18, 2005 p. C.8

[775] Ibid.

[776] Cohen, Andrew. "It's open season on Clarkson. " The Ottawa Citizen. Ottawa, Ont.: January 25, 2005. p. A.14

[777] Ibid.

[778] McWhinney. Edward. The Governor-General and the Prime Ministers: The Making and Unmaking of Governments. Ronsdale Press: Vancouver, 2005.

Andrew Cohen explained the criticism, "After more than five years of the most active and engaged Governor General in living memory, filled with elegance, eloquence and achievement, we see a pattern here. No matter what she does, no matter how hard she works, Madame Clarkson draws criticism like none of her predecessors."[779] In the context of criticism from Alberta, McWhinney would cite other incidents in which Alberta had created a tempest in a teapot unnecessarily.

D. Minor Changes to the Office

The Offices of the Governor General and the Lieutenant Governor are constitutionally entrenched requiring unanimous consent before major alterations is possible. However, there are some simple and even obscure ways to change some aspects of the Offices. One option is a request for new *Letters Patent* and *Letters Patent* for the Lieutenant Governors. This happened in 1931. After the Statute of Westminster and the Imperial Conferences had altered vice-regal conventions, the *Letters Patent* of June 15, 1905 were no longer sufficient. Prime Minister Richard Bennett noted in the House of Commons, "On March 23, 1931, His Majesty, on the advice of His Majesty's government in Canada, issued *Letters Patent* and instructions."[780]

Theoretically, a change to the *Letters Patent* could transfer the exercising of prerogative powers to the Prime Minister. However, for Her Majesty to transfer the Royal Prerogatives to the Prime Minister would lead to calls for similar action in the United Kingdom. Her Majesty would most likely politely decline a Canadian First Minister's request on this matter. In essence, only minor changes to the Office of Governor may be achieved with the alteration of the *Letters Patent*.

Another change to the Office of the Governor General could come with election, by either the House of Commons or the electorate. Arguably, this decision might require some Constitutional consent as it would violate the Queen's power to have the final say on the appointment of Canada's Governor General. In 1994, Alex Shepherd a Liberal

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[779] Cohen, Andrew. "It's open season on Clarkson. " The Ottawa Citizen. Ottawa, Ont.: January 25, 2005. p. A.14

[780] Canada, House of Commons *Debates* July 30, 1931 p. 4389

MP for Durham claimed that the position of Governor General "has no relevance to many Canadians."[781] In the House of Commons on March 7, Shepherd questioned the contemporary role of the Governor General,

> Mr. Alex Shepherd (Durham): Mr. Speaker, our Governor General has come under criticism recently. I believe that the people of Canada want and deserve a greater voice in choosing our head of state. While I realize that the Governor General is the Queen's representative, I also note that the Queen generally accepts the advice of the elected Government of Canada. In order to heighten the legitimacy of this office, I believe that the time has come for the Governor General to be elected by all the people of Canada. I note that the vast majority of the industrialized countries that are our trading partners elect their heads of states. Currently our system is one of appointment which I feel has outlived its usefulness. Electing the head of state would be an excellent opportunity for the people to be involved in our nation's affairs and, at the same time, would make the office directly responsible to all the people of Canada.[782]

However, the solution proposed by Edward McWhinney would be more likely and arguably has more Constitutional merit,

> McWhinney argues the G-G's office might need more legitimacy to enable the individual to reject such requests. That legitimacy could be obtained if, say, there were a requirement for a majority vote in the Commons confirming each G-G appointee. Ever the realist, McWhinney writes, "No doubt for this reason prime ministers have not been enthusiastic about proposing this change.

The same practice might be adopted for Lieutenant Governors. The Prime Minister might decide to first receive the approval of their legislative assembly before having the vice-regal sworn-in. However, this represents a situation that might not be in the Prime Ministers interests.

E. Preliminary Conclusions

For most of this thesis, an argument was submitted that vice-regals in Canada have continued political relevance. However, it is necessary to acknowledge some limitations on their offices. One of the most important limitations on vice-regal offices has been the problems with patronage. There is evidence that some vice-regals are too loyal to the first minister that appointed them. Scholars such as Eugene Forsey and Frank Mackinnon have raised concerns over vice-regals that are too beholden to a first minister. Their concerns are that in a Constitutional quagmire vice-regal might "improperly favour" the first minister. The performance of Ray Hnatyshyn was a demonstration of a Governor General that was too bound to his first minister. Hnatyshyn attempted to convince Don Getty to acquiesce to the Prime Minister's demands on the Meech Lake Constitutional accords.

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[781] "Elect next Governor-General, Grit urges. " Daily News. Halifax, N.S.: Mar 8, 1994. p. 9

[782] http://www.parl.gc.ca/35/1/parlbus/chambus/house/debates/031_94-03
07/031SM1E.html#GOVERNORGENERAL

There is some evidence of vice-regals having their ceremonial role usurped. One prominent example has been the role of the Commander-in-Chief. Adrienne Clarkson earned wide acclaim after she reinvigorated this role. However, her successor Michaëlle Jean has this role challenged by the Conservative government. Jean was denied on several occasions the ability to travel to Afghanistan ostensibly for security reasons. However, prominent members of the Conservative government, including the prime minister himself, have repeatedly traveled to the country.

Other limits of the powers of vice-regals lie in the fact that some minor changes can be made to the office. However, major changes are not likely to be made as the vice-regal offices are constitutionally protected. Such changes require unanimous consent of the Canadian Parliament and the legislatures of the provinces.

Chapter X. Conclusions

The notion that the role of Governors General and Lieutenant Governors in Canada subscribes completely to the ideal espoused by Walter Bagehot of having only, "the right to be consulted, the right to encourage, and the right to warn," does not fully describe the role of the Governor General and the Lieutenant Governors. Bagehot's advice should seem helpful, but by no means should it be seen as definitive. When defining the proper role of the Governor General and the Lieutenant Governors other elements must be considered also. This includes the understanding that Canada's vice-regals possess the most supreme political powers in Canada as provided by the constitution and royal prerogative. They are the last guardians of the Canadian political order as democratic and just. Vice-regals are also the adjudicators of convention. However, this perception has not been as commonly adopted, as one would hope. One explanation is that since the introduction of the *Charter of Rights and Freedoms*, the study of Canadian political institutions, which included that of the study of executive power, has been left fallow.

Adam Dodek has noted that since the introduction of the *Charter of Rights and Freedoms*, Canadians have been seduced by it. Many Canadians think of the Charter as a unique and vital protection of rights, such that Canada has never had before. Religious, cultural and democratic rights are enshrined and protected in the Constitution. Excesses by the political executives could be checked and struck down by the court, unless they invoked the legislative override, Section 33. On this note, the inadequacies of the Charter become apparent. The Charter of Rights could be finessed in times of emergency as Walter S. Tarnopolsky, Gerald-A. Beaudoin and Claude Bélanger have noted. The Charter does contain loopholes allowing the government to act contrary to the stipulations provided within in times of emergency or war. Who then will protect Canada in such a situation if its vaunted judicial review system cannot? This answer lies in the institution that has arguably always protected Canadians from the executive excess and tyranny, the representatives of the Canadian monarch, the Governor General and the Lieutenant Governors. J.R Mallory has cited a political shared political vocabulary contributes to the success of a political system. However, in this vocabulary vice-regals have remained a code word, kept cryptic by myths perpetuated by republicans and King-Liberals and by the elected executives in a desire to usurp the powers of the Crown for themselves. As such, the offices have become misunderstood.

A misconception in Canada does truly exist to the extent that the Governor General and the Lieutenant Governors are thought politically impotent. Myths surround the office including a prominent one that vice-regals cannot play a political role. Any political sentiment espoused or expressed by a Lieutenant Governor or Governor General is rabidly portrayed as a misstep, a breach of the Office, when in fact no such stipulation exists. Yet this prospect has consumed popular opinion, including many citizens, scholars, politicians and even some vice-regals themselves. This is perhaps the result of a self-fulfilling prophesy, like that of the Canadian Senate, if an office is seen as illegitimate over a course of time, it will eventually become illegitimate. One source of this misinterpretation has come from the media. The media has for the most part has not properly studied the role of Canada's vice-regals. Another source is the education system, which educates children on the role of the Charter, but not sufficiently of the role of vice-regals. Many Canadians would be unable to identify who is the Canadian head of state, the Governor General or the Queen. Even fewer Canadians would be able to identify the *Letters Patent*, 1947 or name a royal prerogative knowing that it is in fact a royal prerogative. When vice-regals act this provokes controversy as there is a perception of a lack of legitimacy. After all, Canada is a democratic state. However, this is a bit of a misnomer. While Canada does undoubtedly have democratic features, the word "democratic" did not make it into a Constitutional document until the introduction of the *Charter of Rights* in 1982. Canada is a Constitutional Monarchy, rather than simply a democratic state. The concept of democracy in a Constitutional Monarchy is somewhat of a contradiction. After all, an unelected representative of the Crown has the final say on all the legislation.

Upon consulting Canada's Constitution provided by the Constitution Act, 1867, and 1982, the powers of the Governor General and the Lieutenant Governor are exhaustive. In fact, a reading of the constitution does arguably provide more evidence of a dictatorship than a democracy. Firstly, there is no mention of a first minister or a cabinet in the earlier Constitutional document. This is confusing since those are now the most powerful bodies in Canadian politics. Instead in the Constitution Act, 1867, there are councils that advise the Lieutenant Governor or the Governor General on a course of action, but these councils cannot and still do not execute any real powers formally, as the formal execution of powers is conducted by vice-regals.

The origins for the perceived incompatibility of governors in politics can be traced to the fall of New France. The magnanimous actions of Governors Murray and Carleton vouchsafed the rights of the conquered French majority. The English minority presumed to disagree with the Governor's protection of the majority. The incompatibility was exacerbated when the desire by Upper and Lower Canada for responsible government were not heeded, which ultimately led to rebellion. Even after the rebellion, responsible government was not implemented.

The desire for responsible government was heightened after the rebellion. However, responsible government would not be implemented until 1848. Despite the implementation of responsible government, even after confederation, Governors General did still act in accordance with Imperial interests. Lieutenant Governors acted in accordance to the national interest as Dominion Officers. These interests necessitated circumstances that required Canada's vice-regals to reserve, disallow, and even dismiss first ministers (at the provincial level). At the provincial level this sentiment and these activities were somewhat tempered by the issuance of new *Letters Patent* in 1878, which did not require Governors General to reserve legislation that was contrary to the Imperial interest. The ruling by the Judicial Committee of the Privy Council in *Liquidators of Maritime Bank v. Receiver General* in 1892, did limit of the activities of the Lieutenant Governor, as a Dominion Officer, as he could no longer be regarded as such. However, intervention by vice-regals was by no means considered obsolete.

The Lieutenant Governors and Governors General in Canada were not conferred with the broad and considerable political powers provided by Constitution, Commonwealth law and tradition and of course the Royal Prerogatives simply to be politically impotent and ceremonial. The Offices of the Governor General and Lieutenant Governor were intended to be political, even interventionist, if the situation required it and if violations of Imperial interests and violations of the Constitution, in law and convention, demanded it. The Governor General was intended by the Imperial Government as to be a vital figure in Canada playing a strong role in politics as the monarch played in the United Kingdom. Throughout Canada's history, vice-regals to served as a check and balance to a blooming democracy. With the eventual formation of responsible government and democracy, they continued to serve as a check and balance against excesses of the elected executives. Curiously, most Canadians do not view these vanguards of the Canadian political system this way. This is curious given that other equally undemocratic institutions such as the Supreme Court are regarded as a legitimate check and balance.

The aftermath of the Byng-King episode is where Canadians really got the role of vice-regals wrong. Suddenly, the authority of the Crown became subservient to the "will of the people." However, a Prime Minister whose ministry was guilty of abhorrent misconduct in the customs case was attempting to duck a censure vote and a Parliamentary investigation, which would have ultimately lead to a vote of confidence. King demanded a dissolution and when he did not get it, he resigned in protest, complaining of foreign interference, from Britain. The Meighen government, hampered by King's tomfoolery, fell shortly thereafter in a Parliamentary battle which merely demonstrated further that King had no Parliamentary ethics. Byng did acquiesce to Meighen's request for a dissolution. While the Governor General, Lord Byng, acted properly, he and his office emerged worse for the wear. Mackenzie King was able to distract the electorate over such a simple matter as corruption and turn it into a Constitutional Crisis and an electoral victory. King was left free to interpret the electoral victory as a testament that the Canadian people agreed with him on the matter of the Governor General. King's views were adapted to the ideology of the Liberal Party of Canada, which governed for most of the 20th Century.

Properly understanding the nature of convention is essential to understanding the role of both the Lieutenant Governors and the Governor General. The Canadian

Constitution is such that it is comprised of written Constitutional documents and convention, based upon custom and tradition. The problem with conventions is that it offers an easy excuse by those that seek to perpetuate the myth among Canadians that vice-regals are politically impotent. As Andrew Heard has demonstrated not all conventions carry the same weight, some are more important than others are. The conventions that surround Canada's vice-regals are nebulous and overstated.

The Imperial Conferences and the victory of the Mackenzie King election seemed to establish the conventions that the Governor General or a Lieutenant Governor, by extension, would always have to follow the advice of the Prime Minister. None of the conventions that were established at the Imperial Conference of 1926, 1929 and 1930 stated this emphatically. The Conferences did agree on a rather obtuse formulation, the convention that the Governor General should act in some respect with the Canadian ministry, in the same manner that the King acted in accordance with his ministers from the United Kingdom. However, this cannot be presupposed to ensure acquiescence to the point of subservience as required by the alleged Canadian convention.

The issuance of new *Letters Patent* in 1931, in the immediate aftermath of the Byng-King dispute and the Imperial Conferences, seems to be a repudiation of King's interpretation of the role of the Governor General. None of the conventions of the Imperial Conferences were codified in the Governor General's instructions. The conventions remained conventions and as such could be broken. Article IV allowed for the removal or suspension of any office of Canada. While the Governor General might find a Mayor of Calgary's actions abhorrent and illegal and remove him, the most obvious connotation for this article was the removal of the Prime Minister, the second highest office in the land if you will. Such an undertaking would be contrary to what would undoubtedly be the most fervent advice provided by the Prime Minister to remain in office. Article VIII commanded the obedience of any officer in Canada, military, political and civil, perhaps a reminder to a certain Prime Minister that the offices commissioned by the Crown are to assist and be loyal to the Governor General. In the *Letters Patent*, 1947, these articles were confirmed verbatim.

In the aftermath of Byng-King affair, Lieutenant Governors acted in contradiction of the convention that the Crown cannot act independently of the advice of first ministers. John Campbell Bowen reserved legislation in Alberta in defense of civil liberties and as a bulwark against Constitutional excess by the Social Credit government. The Supreme Court of Canada also confirmed the ability of the Lieutenant Governors to reserve legislation, in *Reference RE Power of Disallowance and Power of Reservation*, in 1938, implying also that the Lieutenant Governors would be able to contradict the advice of his first minister. Actions and interventions by vice-regals throughout the Commonwealth also demonstrated that whatever was accepted at the Conferences with respect to the limitation of the intervention of governors this was sufficiently nebulous and not valid.

On September 28, 1981, the Supreme Court of Canada in *Reference RE Amendment of the Constitution of Canada* broke a tradition of refusing to define conventions. Since *Bill C-60* was referred to the Supreme Court, Canada's highest judicial officers had no choice but to define convention. In the case of unilateral patriation of the Canadian Constitution, the Supreme Court explained that a major convention would be breached. However, the Supreme Court refused to presume that it had the authority to enforce convention or coerce compliance. Instead, a series of scenarios of breaches of major conventions was outlined. These breaches would require the resolution by Canada's vice-regals. Governor General Edward Schreyer saw this as an invitation to intervene and defend conventions, the "spirit of the Constitution." This is part of a joint guardianship. The judiciary will enforce the written laws of the Constitution, as much as they can, while vice-regals, the Governor General and the Lieutenant Governor serve as an adjudicator of convention. As such, they can interpret convention, act against breaches of convention and even break conventions themselves to protect a higher form of convention.

The elected executives such as the Prime Minister or cabinet cannot unilaterally impose conventions on other political bodies without their expressed consent. Convention requires that the necessary actors to feel bound by the convention. If an actor does not feel bound by convention then quite simply the convention does not exist. Actors might also feel bound by convention in normal circumstance but then claim that a situation has arisen that requires them to break convention. This very ability to do so is the prerogative of vice-regals who exercise the power of the Crown. As the adjudicators of convention and last guardians of the constitution, this is their right.

If the popular view of conventions with respect to vice-regals has been refuted how then should the conventions that govern Canada's vice-regals be viewed? As Edward Schreyer had noted earlier, convention is defined by the resoluteness of a vice-regal. Schreyer also noted an essential convention: that a vice-regal should not attempt to substitute his personal views for the democratic will. Andrew Heard noted that vice-regals should follow the advice of a responsible government. A legitimate government must follow the rule of law and the Constitution, including convention.

The transfer of all the Royal Prerogatives to the Governor General in 1947 represented a fundamental change to the office. The Governor General was no longer merely a colonial governor; the Governor General was now *in loco Regis*, a viceroy. The granting of Royal Prerogatives to the Governor General ensured that office would enjoy nearly supreme authority with respect to Canada. It also acknowledged that the Governor General became considerably more powerful since Confederation, refuting the perception that the Governor General has lost power since Confederation. The Office of Governor General may have lost prestige and respect since Confederation, but it has not lost power. Irrespective of the *Constitution Act*, 1867 Governors General now possess the powers of dismissal, disallowance, dissolution, prorogation, treaty-making and assent to name but a few. If the *Constitution Act*, 1867 was amended to remove all aspects of the Office of the Governor General, as long as Canada remained a Constitutional Monarchy, the powers of that office would be largely unchanged as the Governor General would still possess the prerogative powers.

The prerogative powers are the most powerful elements in the Canadian political system. The administration of this authority would be subject to no review or appeal. Prerogative powers are not subject to judicial review, except in very rare cases. The elected political executives cannot exercise these powers. Royal prerogatives cannot become inoperative by simple disuse, as they require a very explicit and tenable proposal for their removal. It was also a reminder to Canada's federal elected executive that the Office of Governor General was superior to that of the Prime Minister. The issuances of the modern *Letters Patent*, since 1931 onward should be seen as a reassertion of the Canadian Crown would still have relevance in modern times.

Throughout the thesis, the emergency or reserve powers of the Governor General and the Lieutenant Governor have been fervently defended as being operative in the contemporary era. The concept of peace, order and good government, which encapsulate *salus populi est suprema lex* and *salus republicae est suprema lex*, must be followed by Canada's vice-regals, as they are the last guardians of the Canadian Constitution and the ultimate adjudicators of convention. If there were any breaches by a first minister or some other political body, a vice-regal in Canada would be able to intervene. With respect to the first minister, vice-regals have the power to refuse the advice of dissolution, force dissolution, dismiss and appoint a ministry, reserve legislation (at the provincial level), disallow legislation.

Some situations, however, such as the refusal of dissolution might not require this. For instance, as demonstrated earlier, the ability of a first minister to advice a vice-regal is dependent on the ability of his confidence of the Parliament or Legislature, as well as the confidence of the vice-regal. If a first minister were to lose the confidence of the Parliament or Legislature, his or her advice would not be regarded as advice but as suggestion. A request after such an event would not immediately be followed if there were another party that could command the confidence of the Parliament or legislature. Another situation that might require a refusal of dissolution would be if a first minister requests an election in the immediate aftermath of another election (i.e. a year after). At this point, the vice-regal would have complete discretion over the matter and might decide that it would be too destabilizing to have too many elections in such a short period, as this would conflict with the Constitutional maxim of peace, order and good government.

Perhaps some of the thresholds for the other reserve or discretionary powers require reiteration. As we saw in the Whitlam dismissal, a first minister may be dismissed if he could not obtain supply by the traditional methods. This instance did not involve any corruption, but in the end, the will of the Governor prevailed. Other instances that require dismissal would be evident in a first minister's complicity in a criminal act (as nearly evidenced in Manitoba in 1915 and in British Columbia in 1991). Another instance might result from a first minister repeatedly flaunting the constitution either in law or in spirit. Such a prospect is not uncommon to Canada. One autocratic Premier is reputed to have said to another over violating the Constitution 'What's the constitution between friends?' Another instance might come because of personal choice by the vice-regal, or in retaliation. An instance that had both the elements of retaliation and a Premier flaunting the constitution came with Lieutenant Governor John Bowen and Premier William Aberhart. After the Lieutenant Governor was removed from Government House, he juxtaposed Aberhart's extra-Constitutional activities with a personal slight and the result was almost a dismissal. Without going into an exhaustive outline of what circumstances would require intervention it should be noted that this discretion is entirely up to the vice-regal.

While Canada does not have an explicit separation of powers as the United States, they nonetheless exist. The Constitutional Monarchy, Canada's political system, can see its roots in the political system classified by Aristotle, modified by British Parliamentary tradition. Within the separation of powers is an implicit system of checks and balances. Democracy, like all political systems, does have it flaws so it is necessary to establish some safeguards. Democracies can descend into mobs. Sometimes there may be a execution of the will of the majority, which may not be necessarily a good thing. The French Revolution and the riots on Whyte Avenue during the NHL playoffs in 2006 did demonstrate the will of the people at a given place, but this is perhaps not ideal. Therefore, a limiting element that rests outside the democracy is needed.

That is the concept of a Constitutional Monarchy. A Constitutional Monarchy follows a written constitution or one based on tradition and convention. However, it provides protection that ensures that democracy does not become demagoguery with the presence of the monarch. Similarly, this system ensures that the Office of the Prime Minister does not degenerate into a dictatorship, and other elitist bodies such as the

Senate, which have arguably been eclipsed by the Supreme Court in this field, do not become oligarchies. To ensure this functionality all political power is derived from the Crown and ultimately responsible to it. The Constitutional Monarchy also ensures that individual rights are usurped. Long before the introduction of the *Charter of Rights and Freedoms*, a body existed that already possessed the features to protect the rights of the individual. That can be seen right from the foundations of the British Parliamentary system in Canada that came with the fall of New France. The magnanimous gestures by Murray and Carleton protected the rights of the French *Canadien* just as effectively as any Charter would have. The myths surrounding the Lieutenant Governors and Governor General have tricked many vice-regals, but not all (i.e. Ralph Steinhauer) into thinking that they no longer had a role to protect minority rights. In fact, in the provinces where there are fewer partisan checks and balances it could be argued that Lieutenant Governors have a greater role to play in the protection of minority rights.

The operation of the Canadian political system is dependent on the proper execution of the separation of powers. There is a frequent complaint of a democratic deficit in Canada. Too much power is concentrated in the offices of the first minister. The Legislative Assemblies are being seen as having decreasing relevance. One solution is that vice-regals must begin to be seen as legitimate by the public. This is not to say that vice-regals are not legitimate to act. Arguably, they act far more than one would think, but as most of the interactions between the vice-regal and the first minister are *in camera*, and protected by a four hundred year tradition of confidentiality, it is difficult to prove anything about these interventions. As one argument within this thesis speculated, there is a possibility that serious discussions have been held over such incidents as the sponsorship scandal, in which it was possible that a vice-regal could have made an ultimatum to a first minister. However, the ability for vice-regals to ensure the proper operation of the Constitution and convention, it is necessary that they be viewed as legitimate and myths surrounding their illegitimacy should be deconstructed. Of course, another element is that vice-regals will need independence. Politicians and vice-regals should be aware of the proper separation of powers.

To ensure that the Canadian political system does not solely become executed by the Prime Minister's Office and the Supreme Court, as well as the Office of Premier and the provincial superior courts, it is necessary for the rest of Parliament, including the Offices of the Governor General and Lieutenant Governors, to reassert themselves. This does not mean needless intervention. This means greater independence for the Office of the Governor General and the Lieutenant Governors. They should not be regarded as institutions that act on the discretion of the Prime Minister. As described in the thesis, there is evidence of vice-regals being co-opted or too loyal to their first minister. As some scholars have noted, this may mean a vice-regal using his role to the benefit of a political patron. A prominent example was Ray Hnatyshyn who played a role tantamount to being a Governor General in Cabinet. This is an unacceptable prospect that breaches the essential separation of powers required in the Canadian system. In a Constitutional conflict vice-regals should be viewed and actually be neutral arbitrators. Another prospect of concern would come if a Governor General were to shield his political patron from prosecution of a criminal act. The problem is that Governors General and Lieutenant Governors have considerable power, but only the minority of Canadians take the role seriously.

Beginning with the Governors General and Lieutenant Governors of Canada there is clear evidence that they have breached perceived convention and have destroyed the myths that vice-regals in Canada are politically impotent. Roland Michener demonstrated that vice-regals could show discretion even in the event of government being defeated in a clear confidence vote, if they felt it was not a true representation of the confidence of the House of Commons. That precedent also demonstrated that the implementation of any emergency or war powers in Canada requires the consent of the Governor General. The extremely close federal election in 1972 alerted Michener to the fact that even if he did not want to; he might be forced to intervene.

Edward Schreyer also demonstrated that the Governor General possessed discretionary power in modern times. The reaction to the fall of Joe Clark's government quite purposefully demonstrated a repudiation of the belief and practice perpetuated after the Byng-King episode that a Governor General had no discretion in a case of dissolution. Schreyer quite thoughtfully considered the 'advice' (really suggestion) of Clark, seeing if there was another person that could command the confidence of the House of Commons. Schreyer's contemplation represented a delay that first ministers are not perhaps used to. However, in a situation of a minority government first ministers should not assume that they could order a vice-regal to do their bidding. Schreyer's discussion and a possibility of a forced dissolution had Trudeau attempted to unilaterally patriate the constitution, demonstrates that a breach of convention could be rectified by a Governor General. The Courts are largely powerless to enforce convention. The Governor General was in this instance an adjudicator of convention and was willing to act without ministerial advice to force a dissolution to protect convention.

Other Governors General in Canada has demonstrated a perception of their role other than strictly as a ceremonial figure. Jeanne Sauvé desired to enhance the Office of the Governor General. Sauvé did ensure that Prime Minister Brian Mulroney was made aware when he infringed on the territory of the Governor General. Sauvé could have been perhaps more careful with respect to the appointments made by Trudeau and Turner though. In her speaking out in favour of Meech Lake Sauvé demonstrated that the Governor General could speak out on political matters. The situation in which Governor General Adrienne Clarkson placed herself during the 38th Parliament illustrates the importance of a Governor General in modern times. During this time, Clarkson served as a neutral arbitrator in a Parliamentary quagmire if not a minor Constitutional Crisis. Michaëlle Jean would prove that a Governor General could criticize a provincial government on its policy and urge a more equitable distribution of resources.

Lieutenant Governors in Canada have also exhibited relevance in Canada's political system since the Byng-King episode. The activities of John Bowen and William Walsh under early Social Credit governments demonstrated that Lieutenant Governors do serve as a bulwark against the Constitutional excesses of provincial governments. In 1961, Frank Bastedo demonstrated that reservation was still a power that could be exercised by Lieutenant Governors. Ralph Steinhauer defended native rights during his tenure as Lieutenant Governor. Gordon Towers and Bud Olson would raise concern over excessive orders-in-council. David Lam would demonstrate that a Lieutenant Governor could dismiss a Premier in modern times.

Fully applicable in Canada several Commonwealth precedents have demonstrated the vice-regals can still act. Precedents in Australia have shown dismissal, refusal of dissolution and disallowance. The dismissal of Gough Whitlam in 1975 was a momentous occasion, showing that a Governor General could fire a Prime Minister over a matter of supply. It also demonstrated that vice-regals possessed considerable powers in modern times. In Grenada, Governor General Paul Scoon was able to call on foreign powers to intervene to overthrow a revolutionary military council in 1983. Even though the revolutionary government had taken away many of the Governor's powers conferred to him by statute, the United States had determined, nonetheless, Paul Scoon still possessed the prerogative powers of Her Majesty and this was sufficient authority. After the American invasion, there was no legal order, instead chaos, so the Governor General began to exercise the regular powers of government. All told, these modern precedents demonstrate that the perceptions and myths surrounding the Governor General and Lieutenant Governor are not entirely accurate and when there is need for intervention and action, vice-regals can indeed act.

If my entire argument claims most Canadians have a wrong view of the role of Canada's vice-regals, it must logically follow that as demonstrated by the evidence and research provided within this thesis, some have correctly perceived the role of the Governor General and the Lieutenant Governor. While it should not be endeavoured to construct an exhaustive list, as a survey might be more appropriate. Walsh, Bowen, Steinhauer, Lam, Aird, Hole for the most part got the role of the Lieutenant Governor correct and executed the tenures with distinction according to the evidence and research. Similarly, Schreyer, Clarkson, Michener and to some extent Sauvé and Jean knew the proper role of the Governor General and proceeded in executing it well. However, Edward Schreyer should stand out as a Governor General whose experience and insight demonstrated a profound understanding of the role. In this instance, it might be helpful to cite his background as a scholar, MLA, MP, first Minister as providing considerable insight into the proper role of vice-regal responsibilities.

Several scholars have gotten the role of Canada's vice-regals right including Cheffins, Dawson, Forsey, Mallory, McWhinney and Ward. These people, especially Forsey, were able to provoke a sort of renaissance for vice-regals in Canada by frequently contending that they did have a role to play even in a modern Constitutional Monarchy. Forsey proved considerably abrupt in writing Letters to the Editor of newspapers that got the role of the vice-regals wrong. Andrew Heard should also be applauded for his study of conventions and the role of the Governor General, being one of the few to continue to study traditional political science by examining the Crown. Some Commonwealth scholars such as D.A Low and Geoffrey Marshall should be commended on their contribution to the understanding of convention and how the Governor General and the Lieutenant Governor by their presentation of precedents and the theory of how a representative of Her Majesty should properly execute office. Of course, there are others in Canada who has written correctly on the role of the Lieutenant Governor and Governor General, but not to the distinction that the aforementioned people did. This is not to say that everything that these individuals have said and done was correct in their interpretation of vice-regals in Canada, but by far and away, the majority of their analyses could be viewed as accurate. Several texts have continued relevant to the study of vice-regals in Canada. The consultation of those that believe in the continued existence of a reserve power for the Crown is a good start. This long list includes the following scholars: Austin, Hearn. Todd, Dicey, Anson, Low, Marriot, Keith, Ramsay Muir, Lowell, Jenks, Jennings and Asquith, and Laski.

The Constitutional Monarchy in Canada should still be considered important. Despite the popularity of the myths that surround the vice-regal offices, it is necessary to note the sentiments that surround the monarchical office. The Queen is still viewed as a unifying symbol, not only one that provides a ceremonial role, but also one that can ensure the safety and security of the Canadian people. For instance, there is the belief among many that everyone is answerable to the Queen. Canadians still will appeal to the Queen asking her to remove the Prime Minister or the Governor General. What has not been fully realized is that the powers of the Queen have been divested to her representatives in the Governor General and Lieutenant Governors. However, this can be easily changed. The Governors General and the Lieutenant Governors do have the legitimacy to intervene and defend the Constitution, convention and the security of the state and people. However, what could be improved is the perceived legitimacy given by the public. This can be easily changed with appointing qualified people to the vice-regal positions. Too often, the vice-regal offices are seen as patronage postings or simply a demonstration of Canada's multi-culturalism.

On a subconscious level, many Canadians still see the need for a Constitutional Monarchy. This can be viewed by the fact that Canada is not a republic, nor does the majority of its citizenry possess republican desires. According to the people, there is clearly still a need for the Constitutional Monarchy. Perhaps this part of the Canadian subconscious, which suspects that as long as Canada possesses a monarchical system it will have peace, order and good government.

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